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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 124.

MINNESOTA STATE LIBRARY.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE, PETITIONERS,

vs.

C. W. MANSUR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 9, 1907.
CERTIORARI AND RETURN FILED DECEMBER 3, 1907.

(20,783.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1908.

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a TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit

No. 1606.

C. W. MANSUR, Appellant,
versus
W. E. DUPREE ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Texas.

[Original record filed August 25, 1906.]
U. S. Circuit Court of Appeals. Filed Sep. 26, 1906.
CHARLES H. LEDNUM, *Clerk*.

1 *Caption.*

Be it remembered, That at a Term of the United States Circuit Court in and for the Western District of Texas, sitting as Court of Equity, begun and holden at Waco in said district on the 26th day of February, 1906, and concluded on the 3rd day of March, 1906, Hon. T. S. Maxey, District Judge, presiding, the following cause came on for hearing, to-wit

No. 274. In Equity.

W. E. DUPREE ET AL., Complainants,
versus
C. W. MANSUR ET AL., Respondents,

and

C. W. MANSUR, Cross Complainant,
versus
W. E. DUPREE ET AL., Cross Defendants.

2 *Complainant's Amended Original Bill of Complaint.*

Filed April 4th, 1906.

In the United States Circuit Court for the Western District of Texas, at Waco.

In Equity. No. 274.

MOLLIE E. DUPREE and WILLIAM E. DUPREE, Plaintiffs,
vs.
W. C. MANSUR and A. S. KEADY, Defendants.

To the Honorable, the Judges of the Circuit — of the United States, in and for the Western District of Texas:

Now come plaintiffs and with leave of Court first had and obtained amend their original bill or petition filed in the Fifty-fourth Judicial

District Court of McLennan County, Texas, from which Court this cause has been removed as follows:

Mollie E. Dupree, joined by her husband, William E. Dupree, both of whom are citizens of the State of Texas and reside in McLennan County in said State, bring this their bill against C. W. Mansur and A. S. Keady, both of whom reside in St. Louis, Missouri, and are citizens of the State of Missouri.

And thereupon your orators complain and say:

(1) That heretofore on to-wit the 31st day of December, A. D. 1894, one O. Bailey, by deed of conveyance of that date, sold and conveyed to said W. E. Dupree an undivided one-half interest in and to lot No. 1 in Block No. 2 in the City of Waco, McLennan County, Texas, as shown by map of said city, fronting fifty feet on Bridge street and running back 165 feet to the alley. That as part consideration for said conveyance said W. E. Dupree executed to said O. Bailey five certain promissory notes, each for the sum of $900.00 dated December 31st, 1894, and due respectively one, two, three, four and five years after date and bearing eight per cent. per annum interest and which said notes were secured by vendor's lien on said property, and also by deed of trust, bearing even date with said deed, executed by said W. E. Dupree to one W. W. Lastinger as trustee, which said lot of land was conveyed by said W. E. Dupree to said W. W. Lastinger as trustee, with power to sell in event of failure on the part of said Dupree to pay said notes as they matured, and it was provided in said deed of trust that failure to pay the annual interest on said notes should mature the same at the option of the
3 holder. Said deed of trust provided for the sale of said land in event of default in the payment of said notes, by the trustee named therein, at public sale at the court house door in McLennan County, after giving notice thereof by publication in some newspaper published in the City of Waco for twenty days prior to the day of sale. Said deed of trust further provides that in the event of the failure, refusal or disqualification of the said W. W. Lastinger to act as trustee under said deed of trust then said O. Bailey, or his legal representative, should have power to appoint a substitute trustee, in writing, with same powers delegated to said original trustee. Said trust deed further providing that in any deed given by any trustee thereunder, any and all statements of fact or other recitals therein made as to any preliminary act or thing having been duly done by said trustee, should be taken by any and all courts of law and equity as *prima facie* evidence that such statements or recitals of fact should be accepted without further question.

(2) Petitioners further aver that from and after the purchase of said property hereinbefore described, 50 feet front of said property on Bridge street and running back 125 feet became and has ever since continued to be the business homestead of petitioners.

(3) Plaintiffs aver that on to-wit, the 25th day of May, 1896, plaintiff W. E. Dupree sold and conveyed 40 feet off of the northwest end of said lot No. 1 in Block 2 adjoining the alley to one J. C. Birkhead by warranty deed, and that in part consideration therefor said Birkhead executed and delivered to the said W. E. Dupree four

notes for the sum of ($1,000) one thousand dollars each, due respectively January 1st, 1899; July 1st, 1899; January 1st, 1900; and July 1st, 1900. That subsequently on or about to-wit, the 3rd day of December, 1896, the said W. E. Dupree for a valuable consideration to him paid by the said M. E. Dupree transferred and assigned to the said M. E. Dupree the said above described four notes for one thousand dollars each as the separate property of her, the said Mollie E. Dupree, and thereafter on to-wit, the 8th day of May, 1992, said J. C. Birkhead for the consideration of the cancellation and surrender of the above mentioned four notes sold and conveyed to the said M. E. Dupree as her separate property the said forty feet off of the northwest end of said lot 1 adjoining the alley above described.

(4) That on to-wit, the 2d day of December, 1896, the said W. E. Dupree for the consideration of one dollar and love and affec-
4 tion conveyed to said Mollie E. Dupree the remaining balance of said lot to-wit, 50X125 feet fronting 50 feet on Bridge street and running back 125 feet to the portion of said lot sold to said Birkhead as above stated, and that the title to the whole of the said Lot 1, Block 2 is now vested in the said Mollie E. Dupree, who is the legal and equitable holder and owner of the same, and that she is now in possession thereof as her separate property.

(5) Petitioners further aver that after the execution of the notes, hereinbefore set out, by said W. E. Dupree to said O. Bailey, the said O. Bailey sold, transferred and delivered the same to one S. W. Slayden, who continued to hold said notes until they were all fully paid off and discharged by the said W. E. Dupree as hereinafter alleged. That said W. E. Dupree paid off and discharged the said notes and thereafter on or about the 24th day of December, A. D. 1897, the said S. W. Slayden, who was the owner and holder of said notes as aforesaid, executed and delivered to the said W. E. Dupree a release of the said deed of trust and the mortgage created thereby on the land, which said release is in words and figures as follows, to-wit:

STATE OF COLORADO, *County of Arapahoe:*

Whereas W. E. Dupree, for the purpose of securing the payment of five certain promissory notes for the sum of nine hundred dollars each (forty-five hundred dollars) and interest in favor of O. Bailey dated at Waco, Texas, December 31st, 1894, due January 1st, 1896, '97, '98, '99 and 1900 from date thereof did convey unto W. W. Lastinger by a deed of trust duly recorded in the records of McLennan County, Texas, Book 21, page 315, all that certain tract or parcel of land described in said deed of trust lying and being in the County of McLennan and State of Texas and in the City of Waco.

Now, therefore, know all men by these presents that S. W. Slayden, the owner and holder of said notes, to whom same were assigned by O. Bailey in said deed of trust named as beneficiary for and in consideration of the full payment and satisfaction of the said promissory notes, both principal and interest, the receipt whereof is hereby fully acknowledged, do hereby remise, set over, release and re-convey unto the said W. E. Dupree his heirs and assigns all and singular the

property and premises in said deed of trust described forever, free and quit of the above named encumbrance.

5 In testimony whereof I, S. W. Slayden, beneficiary, hereunto subscribe my name in Denver, Colorado, this the 24th day of December, 1897.

S. W. SLAYDEN.

STATE OF COLORADO, *County of Arapahoe:*

Before me, Anna M. Fertig, a Notary Public in and for Arapahoe County, Colorado, on this day personally appeared S. W. Slayden known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 24th day of December, A. D. 1897.

ANNA M. FERTIG,
Notary Public, Arapahoe County, Col.

My commission expires February 21, 1901.

And which said release has been duly registered in the deed records of McLennan County, as shown in Book 28, page 389 of the Real Estate Mortgage Records of McLennan County, Texas. And petitioners aver that said notes have been paid off and discharged and said mortgage fully released as hereinbefore set out.

(6) Petitioners further aver that on or about the 3rd day of December, 1896, the said W. E. Dupree executed a certain deed of trust with power of sale and delivered the same to J. C. Birkhead, the trustee named therein, for the purpose of securing and paying off certain indebtedness of the said W. E. Dupree to his creditors named in said instrument, and among others of the creditors named in said instrument was the said S. W. Slayden, who was then owner and holder of the notes described in paragraph 2 of this bill, all of which, except the one maturing December 31st, 1895, were then unpaid; and the said deed of trust to the said J. C. Birkhead as aforesaid was made for the purpose of securing and paying off among other indebtedness, the said notes above described so held by the said S. W. Slayden. Petitioners further aver that thereafter on the 5th day of December, 1896, Mansur Tebbetts Implement Company and Washburn and Moen Manufacturing Company, creditors of said W. E. Dupree, secured in said deed of trust of December 3rd, 1896, brought their bill in the United States Circuit Court for the Northern District

6 of Texas at Waco, against the said W. E. Dupree and the said J. C. Birkhead and the Provident National Bank of Waco, wherein they secured the appointment of a receiver to administer the said deed of trust so executed by the said W. E. Dupree on the 3rd day of December, 1896, in the place and stead of the said J. C. Birkhead, who had been named as trustee therein as aforesaid. And thereafter on the 9th day of December, 1896, W. B. Belknap & Co., also secured creditors of the said W. E. Dupree under said deed of trust, also brought their original bill in said United States Circuit

Court for the Northern District of Texas at Waco, against W. E. Dupree, J. C. Birkhead, Provident National Bank, S. W. Slayden, Rosebud Furniture Co., M. E. Dupree and James B. Baker, wherein they sought the appointment of a receiver to administer said deed of trust in the place of the said J. C. Birkhead, and wherein they applied to have certain securities alleged to be held by the other defendants besides that given in said deed of trust of December 3rd, 1896, marshalled, but not including therein the security created by said deed of trust to said W. W. Lastinger, trustee.

And petitioners allege that the deed of trust given by the said W. E. Dupree to the said W. W. Lastinger as trustee to secure said O. Bailey in the payment of the notes described in said deed of trust and herein referred to, although said notes were then held by the said S. W. Slayden, was not mentioned in either of the said bills in equity, nor was any relief prayed for in respect thereto in either of said bills, nor was it sought to marshall same with the other securities. And petitioners further allege that said bill of said Mansur and Tebbetts Implement Co. and Washburn and Moen Manfg. Co. and the bill of the said W. B. Belknap & Co. were consolidatdd in said United States Circuit Court at Waco and one F. F. Finks appointed receiver in both causes, and tried and disposed of in said court as one cause, and that on final determination of said consolidated causes, it was considered, adjudged, and decreed by the Court that the said W. B. Belknap & Co. take nothing by their said original bill.

Petitioners further aver that in said consolidated cause a general order was made by said Court on the 9th day of March, 1897, requiring all parties claiming any interest in the proceeds of the sale of the property conveyed by said deed of trust of December 3rd, 1896, and made under the direction of the Court by the receiver aforesaid, to present their claim by intervention on or before rule day in April, 1897, and in default thereof be barred and precluded from participating in the distribution of such proceeds, and that such claims be referred to the Standing Master for his report. That in re-

7 sponse to said order, said S. W. Slayden, the owner and holder of said notes, to O. Bailey described in paragraph 2 hereof, filed in said court in said cause his petition of intervention and claimed priority for the payment of his said indebtedness out of the said fund, and showed in his said petition that said notes were secured by the deed of trust executed by W. E. Dupree to said W. W. Lastinger as trustee as hereinbefore set out; and thereafter said Standing Master made his report in said cause and recommended payment of the notes aforesaid of S. W. Slayden as a prior claim out of said fund and that certain creditors secured by the deed of trust to J. C. Birkhead, trustee, as aforesaid, be subrogated to the lien which said S. W. Slayden held by virtue of the deed of trust to said Lastinger of date December 31, 1894, on the real estate therein described; and thereafter on the 26th day of June, 1897, the said Circuit Court entered its final decree in said consolidation cause, awarding the said S. W. Slayden the amount due him on said notes, of which three were still unpaid, to be paid out of the proceeds of the sale of property conveyed in said deed of trust of December 3rd, 1896, and di-

recting that said notes, being three for nine hundred dollars each, should upon payment of the amount thereof to said S. W. Slayden, be by him indorsed without recourse and delivered to the receiver in said cause, who was then directed to sell said notes, and pay the proceeds thereof into the registry of said court to be applied as other funds in said cause. That thereafter said S. W. Slayden received of said receiver the full amount of said notes out of the proceeds of the property conveyed under the deed of trust of December 3, 1896, and indorsed and delivered said notes to the said receiver, who thereafter sold the same to one J. C. Duke for the sum of three hundred dollars.

And the petitioners aver that said C. W. Mansur now claims to own and hold said notes by, under and through the said J. C. Duke by virtue of his purchase of the same as hereinbefore set out, the said Mansur claiming an assignment of said notes from said Duke.

And petitioners aver that the said J. C. Duke never acquired any title to the said notes by or through the proceedings hereinbefore set out, and never acquired any right, title or claim to the lien or mortgage or deed of trust evidenced by said instrument executed by said W. E. Dupree to said W. W. Lastinger, trustee, as aforesaid, for the reason that before the institution of said proceedings in the said United States Circuit Court, and before the execution of the deed of trust aforesaid by the said W. E. Dupree to said J. C. Birkhead, trustee, the said 50 x 125 feet of said property was
8 the homestead of the said W. E. Dupree and the title thereto had vested in the said Mollie E. Dupree, to whom the same had been conveyed on the 2d day of December, 1896, and the said W. E. Dupree had the right after he sold and conveyed his said business homestead to his wife Mollie E. Dupree, to pay off and discharge the said lien and incumbrances created by said deed of trust, with any other money or property he then had free from the right of other creditors of his to require the marshalling of securities in respect to the said deed of trust on said business homestead for the payment of which provision was made by the said deed of trust of December 3, 1896.

Petitioners further allege that no issue was made in either of said original bills filed in said consolidated causes as hereinbefore alleged, nor was any pleading filed in either of said consolidated causes to which the said Mollie E. Dupree or the said J. C. Birkhead were parties whereby any relief was sought against the said Mollie E. Dupree or the said J. C. Birkhead in respect to the marshalling of assets or securities as against said property conveyed to them respectively by said W. E. Dupree as hereinbefore set out. And petitioners further aver that in the deed executed by said W. E. Dupree to the said J. C. Birkhead no provision whatever was made for the payment of said Slayden notes, but as between the said J. C. Birkhead and the said W. E. Dupree it was understood and agreed that the said Dupree should pay off and discharge said Slayden or Bailey notes against said property, and should free the portion of the lots so sold to said Birkhead from the lien created by said deed of trust to Lastinger as trustee.

(8) And petitioners further aver that thereafter, the said J. C. Duke claiming the said notes made to said O. Bailey aforesaid by his pretended purchase thereof from said receiver in said consolidated cause in said United States Circuit Court, brought suit on same in the District Court of McLennan County, Texas, against your petitioners as defendants, wherein he sought judgment upon said notes and a foreclosure of the lien upon said property and that thereafter the said J. C. Duke dismissed his said suit in said Nineteenth Judicial District Court and that a judgment of dismissal was duly entered therein.

(9) That thereafter on to-wit the 27th day of March, 1899, the said J. C. Duke filed his supplemental bill in cause No. 178 Equity in the United States Circuit Court for the Northern District of Texas at Waco, styled J. C. Duke *vs.* W. E. Dupree *et al.* (said cause
9 being a bill in equity brought by J. C. Duke against these petitioners W. E. and Mollie E. Dupree), in which supplemental bill, he, the said J. C. Duke, set out the said notes executed by the said W. E. Dupree to the said O. Bailey, and the said deed of trust to secure the same as hereinbefore alleged, and the execution of the subsequent deed of trust by the said W. E. Dupree on the 3rd day of December, 1896, and the consolidated suit and bills of the said Mansur-Tebbetts Implement Company and Washburn-Moen Manufacturing Company and the said W. B. Belknap & Co. and the action of the said Circuit Court thereon, and the intervention of the said S. W. Slayden, and the report of the Master on said intervention, and the final judgment of the Court in respect to said notes, and the payment of said Slayden, and the assignment by him (Slayden) to the receiver in said consolidated cause pursuant to said decree and the purchase by said J. C. Duke from said receiver of the said notes, and that he was thereby the owner and holder of the said notes. And further alleging in said bill in equity that the said W. E. Dupree had failed to pay the interest on said notes, that default had thereby been made, and he prayed for a foreclosure of the said deed of trust of December 31st, 1894, against the property described therein and that the same be sold in satisfaction of the debt evidenced by said notes. And petitioners aver that on to-wit the 4 day of June, A. D. 1900, these petitioners, who were defendants as aforesaid in said bill, filed their demurrers to said bill upon the following grounds.

(1) That plaintiff has not in said bill stated such a cause as ought to entitle him to such relief as is therein sought against defendants.

(2) Want of proper parties defendant.

(3) That it did not appear from said bill in the intervention of said Slayden as set out in said bill that any issue was made by any of the complainants or any creditor in said consolidated causes by their pleadings setting up a claim of subrogation to such lien, and it does not appear that there were any pleadings on which to base the findings of the Master as set out in plaintiff's said bill.

(4) That it did not appear from said bill that there was any

pleading in said consolidated causes in respect to the assignment of said notes by said Slayden to said receiver upon payment to him of the amount of same by said receiver, and no such relief was asked for by any party to said consolidated cause.

(5) That it did not appear from said bill that the Master was directed by any order of reference made by the Court in said consolidated cause to inquire into or report upon the rights of creditors or complainants to subrogation to the lien held by said Clayden.

(6) Because it did not appear from said bill that petitioners who were defendants in said bill had any notice of any issue made in said intervention of said S. W. Slayden in said consolidated cause of the right of creditors to be subrogated — said lien.

(7) That it appeared from said bill that all the proceedings in said consolidated cause occurred subsequent to the time when said Mollie E. Dupree acquired title to said property, and it does not appear from said bill that by any pleadings to which said Mollie E. Dupree was a party, in said consolidated cause, any relief was sought having for its object the subrogation of complainants or creditors in said consolidated cause to the vendor's lien or trust deed set out in said bill, and because it does not appear from said bill that any adjudication was made by said decree in respect to said Mollie E. Dupree's rights in said property.

(8) That said bill seeks reformation of the original decree and shows no excuse why the relief sought in said bill was not asked for or obtained in the original cause and decree.

(9) Because said bill shows no reason why a specific decree of subrogation and foreclosure in favor of said complainants and creditors in said original bill was not rendered in the original decree, it appearing from said bill that by giving said trust deed of December 3rd, 1896, said W. E. Dupree and said S. W. Slayden in effect matured said notes.

(10) That said bill sought a reformation of the original decree which could only be done by appeal or bill in review.

(11) That complainant was barred by his laches and had no right on his own showing to maintain said bill, because more than six months had elapsed since the original decree was passed.

(12) That it did not appear what the other securities held by said S. W. Slayden and mentioned in said bill consisted of, and which were sought to be marshalled in said cause of W. R. Belknap & Co. against said W. E. Dupree and others.

(13) That it appears from the complainants' said bill that both complainants and defendants were citizens of the State of Texas, and therefore said Court had no jurisdiction.

(14) That it appeared from said bill that complainant was merely an assignee of the notes, and as such could not bring a bill to reform the original decree.

(15) That a bill of that character should not be brought to alter

or change matter decreed, but only for error in law appearing
11 in the body of the decree, or new matter arising since the decree, or matter of which the complainant could not have had notice at the time of the original decree.

And petitioners further aver that said cause No. 178 in equity of J. C. Duke *vs.* W. E. Dupree *et al.* came on to be heard in said Circuit Court upon said demurrers on to-wit, the 15th day of October, 1900, and the Court after hearing and considering said demurrers, made its order and decree sustaining in all things all of said demurrers, so urged by defendants to said bill and dismissing said supplemental bill with costs to defendants therein to be taxed against the said complainant said J. C. Duke.

That thereafter the said J. C. Duke prayed and was allowed an appeal from said judgment of said Circuit Court sustaining said demurrers and dismissing said bill, to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to which latter Court said cause was duly and regularly carried on appeal, and the same duly and regularly tried in said Circuit Court of Appeals, and the judgment of the said lower Court was in all things by said Circuit Court of Appeals affirmed.

Whereby the said notes and the said deed of trust and the said lien against said property hereinbefore described became merged into said judgment, and the same were thereby extinguished and annulled and were of no more force and effect.

Plaintiffs further aver that after the aforesaid judgment was rendered on the 15th day of October, 1900, sustaining all of said demurrers and dismissing said bill of said J. C. Duke, the said J. C. Duke on to-wit, the 26th day of October, 1900, applied to and obtained from said Court a further order that said dismissal of said bill should be without prejudice to his right to further prosecute his cause of action against the defendants if any he had attempted to be set up in said supplemental bill and granting to said Duke leave to file a supplemental bill in said cause on or before the rule day in December, 1900; but plaintiffs allege that said Duke elected not to file any further supplemental bill in said cause or to prosecute his said cause further but stood upon the judgment and the decree of the Court, sustaining the demurrers of plaintiffs thereto as aforesaid and dismissing his said bill, and appealed from said judgment and decree as aforesaid to the said Circuit Court of Appeals at New Orleans where said judgment and decree were affirmed as hereinbefore averred.

Petitioners further aver that notwithstanding the said judgment and the extinguishment and the annullment of said notes
12 and said deed of trust and vendor's lien thereby, the said C. W. Mansur, who is now, as the petitioners are informed and believe, claiming to be the owner and holder of said notes under and through the said J. C. Duke by assignment since the rendition of said judgment aforesaid, is seeking to enforce the said deed of trust of date December 31st, 1894, against the property described therein.

Petitioners aver that said C. W. Mansur in his efforts to so

enforce the said deed of trust called upon the said W. W. Lastinger, original trustee in said deed of trust, to advertise and sell the property described as provided by the terms of the said deed of trust, but that said W. W. Lastinger, who is a resident citizen of McLennan County, Texas, knowing that said notes had been paid off and discharged, and knowing that if the said J. C. Duke or his assignee, the said Mansur, ever had or held any rights therein by virtue of the pretended sale of the said notes by the receiver, that the same had been extinguished and annulled by said decree of Court, refused to execute the said deed of trust as requested and refused to sell said land pursuant to the provisions of said deed of trust. That thereupon the said Mansur appointed one A. S. Keady as substitute trustee under said deed of trust, a resident of the City of St. Louis in the State of Missouri, and directed him to proceed to sell said land under said deed of trust for the non-payment of said notes in accordance with the provisions of said deed of trust. And petitioners aver that pursuant to said appointment and in obedience to the request of the said C. W. Mansur the said A. S. Keady as substitute trustee, advertised said land to be sold at public auction in the City of Waco at the Court House door of McLennan County on the first Tuesday in November, 1903, for the alleged purpose of applying the proceeds of such sale to the payment of said notes.

Petitioners further aver that the only authority appointing a substitute trustee contained in said deed of trust to said W. W. Lastinger, trustee, to secure the payment of said notes to said O. Bailey, is as follows: "And should the said W. W. Lastinger, trustee, fail or refuse or be disqualified from acting hereunder, the said O. Bailey or his legal representative shall have power to appoint a substitute in writing who shall have the same powers which are hereby delegated to the said W. W. Lastinger, trustee;" and petitioners aver that the said C. W. Mansur, as the alleged assignee of said note, had no authority or power to appoint the said A. S. Keady substitute trustee and that such appointment does not carry with it any power or authority to make such sale.

13 Petitioners aver that by the payment of said notes as herein alleged by the receiver to the said S. W. Slayden the said notes were paid off and discharged and the said deed of trust given to secure the same and the said vendor's lien was extinguished and annulled, and the same became of no further force or effect. And if the said J. C. Duke ever acquired any interest or title in or to said notes or said vendor's lien or said deed of trust by his pretended purchase from said receiver as aforesaid, then such right or interest was fully extinguished and became no longer of any force or effect by reason of the decree of said U. S. Court at Waco, as herein alleged.

Petitioners aver that if said land is sold under said deed of trust by said A. S. Keady in accordance with the advertisement of the same as hereinbefore alleged and a deed made to the purchaser at such sale that such sale and such deed will cast a cloud upon the title of petitioner, M. E. Dupree, to said property, and the value of her

title will be thereby decreased, and she will sustain great and irreparable injury thereby, and that she has no adequate remedy at law.

Wherefore plaintiffs bring this their bill and defendants having already made appearance and filed an answer in this cause, and the District Court of McLennan County, Fifty-fourth Judicial District of the State of Texas, from which Court this cause was removed to this Court, having already granted a preliminary injunction restraining defendants from making sale of said land under said trust deed, on final hearing hereof plaintiffs pray that such injunction be perpet-ated, and plaintiffs pray that defendants be required to answer this their bill, but not under oath, and they pray for such other and further relief both general and special as they may show themselves entitled to in the premises, and as in duty bound will ever pray, etc.

MOLLIE E. DUPREE,
W. E. DUPREE,
By SLEEPER & KENDALL,
Attorneys for Plaintiffs.

I, W. E. Dupree, being duly sworn on oath state that the allegations and averments set out in the foregoing bill are true in substance and in fact.

W. E. DUPREE.

14 Sworn to and subscribed before me by said W. E. Dupree this the 4th day of April, 1904.

[SEAL.] D. H. HART,
Clerk of United States Courts,
By L. B. MCCULLOCH, *Deputy.*

(Indorsed:) No. 274. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Amended original bill of plaintiffs. Filed 4th day of April, 1904. D. H. Hart, Clerk. By L. B. McCulloch, Deputy. Sleeper & Kendall, Solicitors.

Answer of C. W. Mansur to Complainant's Amended Original Bill.

Filed June 6, 1904.

United States Circuit Court for the Western District of Texas, at Waco.

In Equity. No. 274.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

The Answer of C. W. Mansur, Defendant, to the Amended Original Bill of Complaint of Mollie E. Dupree and W. E. Dupree.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Texas:

This defendant now, and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise

that can be or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, says:

1. This defendant admits that the complainants both reside in McLennan County, Texas, and this defendant is a resident of the City of St. Louis and State of Missouri, and that A. S. Keady, made defendant by the original and amended bills of complaint, was lately, and at the time of the filing of said bills, respectively, a citi-
zen of the City of St. Louis and State of Missouri. But this
15 defendant avers that since the filing of said amended bill the said A. S. Keady has departed this life.

2. This defendant admits the execution of the deed of trust and notes of W. E. Dupree as set forth in the second paragraph of the complainants' bill and that their tenor and terms were substantially as therein set forth.

3. This defendant neither admits nor denies that the property covered by the deed of trust set forth in the second paragraph of the complainants' bill was at any time the business homestead of either of complainants. But this defendant says that he is not advised concerning this matter as to the existence of facts necessary to determine the homestead character of the property.

4. This defendant neither admits nor denies the facts alleged in the third paragraph of complainants' amended bill respecting the sale by complainant W. E. Dupree to one J. C. Birkhead of a strip off the northwest end of block No. 1 and block No. 2, City of Waco, the execution of notes by Birkhead therefor and the subsequent transactions between the complainants and said Birkhead. This *complainant* says he is not advised as to the facts concerning these alleged transactions, and has no sufficient information respecting them on which to base an allegation admitting or denying the facts set forth.

5. This defendant admits that on the 2d day of December, 1896, complainant, W. E. Dupree, for a consideration of one dollar and love and affection as recited in a deed of that date, conveyed the property described in the above mentioned trust deed, to his co-complainant, Mollie E. Dupree. But this defendant says that he is not advised and, therefore, does not admit or deny that the property is now vested in the complainant, Mollie E. Dupree, as regards either the legal or equitable title thereto, but he avers on information and belief, that the said property is now in the possession of the complainant, W. E. Dupree.

6. This defendant admits that after the execution of the notes described in the bill of complaint by W. E. Dupree to O. Bailey, that the said O. Bailey transferred said notes to one S. W. Slayden. This defendant denies that these notes have ever been paid off or discharged, and he denies that said S. W. Slayden at any time when said Slayden was the owner of said notes ever executed any
16 release of the trust deed and mortgage securing said notes on the land described in the complainant's bill. And this defendant avers that if such a release as that described in the fifth paragraph of complainants' bill was ever executed by S. W. Slayden (about which this defendant has no sufficient information), that

the said S. W. Slayden at the time he executed said release was not the owner or holder of the notes secured by such deeds, and such fact was well known to the complainant herein, and that the execution of said release, if it were in fact executed, was wholly void and of no effect on the rights of the parties herein.

7. This defendant admits that on or about the 3rd day of December, 1896, W. E. Dupree executed a certain deed of trust with power of sale, and delivered the same to J. C. Birkhead, as trustee for the purpose of securing the payment of certain indebtedness of said W. E. Dupree to his creditors named in said instrument, and among the creditors named in said instrument were said S. W. Slayden, and that said S. W. Slayden was then the owner and holder of the notes described in paragraph one of complainants' bill, all of which, excepting the one maturing December 31, 1895, were then unpaid. And defendant further admits that deed of trust to the said Birkhead was made for the *the* purpose of securing the payment of, among other indebtedness, the notes above described so held by said Slayden. Defendant further admits that thereafter on the 5th day of December, 1896, Mansur & Tebbetts Implement Company, and Washburn & Moen Manufacturing Company as creditors of said W. E. Dupree secured under the said deed of trust of December 3, 1896, brought their bill in the United States Circuit Court of the Northern District of Texas, at Waco, against the said W. E. Dupree and the said Birkhead and the Provident National Bank of Waco. And this defendant further admits that a receiver was appointed by the said United States Circuit Court of the Northern District of Texas to receive and hold, and under the orders of said Court, to administer the property described in said deed of trust executed by said W. E. Dupree to said Birkhead. And this defendant further admits that on the 9th day of December, 1896, W. B. Belknapp & Company also secured under the said deed of trust executed by W. E. Dupree, brought their bill in said United States Circuit Court against the said W. E. Dupree and J. C. Birkhead and Provident National Bank of Waco, S. W. Slayden, Rosebud Furniture Company, Mollie E. Dupree and J. W. Baker; wherein said Belknapp & Company also sought the appointment of a receiver of the property described in said deed of trust of Decem-

17 ber 3, 1896, and wherein they applied to have certain securities alleged to be held by the other defendants, besides that given in the trust deed of December 3, 1896, marshalled for their benefit. This defendant denies that the notes held by the said Slayden above described were not mentioned in said bills in equity; but on the contrary he avers the facts to be that the said bill of Belknapp & Company by its averments charged that the said S. W. Slayden had other security for the indebtedness held by him against W. E. Dupree, and prayed that the surrender of such other security should be made a condition precedent to his, Slayden's, being paid out of the fund arising from the property covered by the Birkhead trust deed. And this defendant avers that he is advised and believes and charges that the averments of the said bill of W. B. Belknapp & Company covered and included in equity the security held by S. W. Slayden through the notes and trust deed aforesaid on the

real estate described in plaintiffs' bill. This defendant further says that he admits that the bills of Mansur & Tebbetts Implement Company and others and W. B. Belknapp & Company were consolidated in the said United States Circuit Court at Waco, and tried and disposed of in said court as one cause. And he further admits that on final determination of said consolidated cause, it was considered and adjudged and decreed by the Court that the said W. B. Belknapp & Company take nothing by its said bill or by a plea of intervention which it filed therein. But this defendant avers that in said final decree all of the securities impounded by the bill of W. B. Belknapp & Company were charged with lien and ordered sold in favor of the other parties thereto who were adjudged to have a priority of right over said W. B. Belknapp & Company. And all of such impounded securities were held and administered for the benefit of the fund of said receivership. And this defendant further avers that in the said proceeding, the said W. B. Belknapp & Company was in the final decree allowed its attorneys fee out of the fund, on the ground that the filing of said bill of Belknapp & Company had brought assets into the receivership and thereby benefitted the fund; which said assets brought into the receivership consisted largely of the S. W. Slayden notes that the said attorney's fee allowed to Belknapp & Company was in the sum of $250, and was allowed to J. D. Williamson, the solicitor for W. B. Belknapp & Company, complainants as aforesaid, in one of the said consolidated bills. And it is admitted by this defendant that the complainant, Mollie E. Dupree, was by said final decree, adjudged to go hence without day and recover her costs, as this defendant has been informed and believes.

18 8. Defendant further admits that in said consolidated cause a general order was made by said Court on the 9th day of March, 1897, requiring all parties claiming any interest in the proceeds of the sale of the property conveyed by said deed of trust of December 3, 1896, which had been sold by the receiver, to present their claims by intervention on or before the rule day of April, and in default thereof to be barred and precluded from participation in the distribution of such proceeds, and that such claims be referred to the Standing Master for his report. And the defendant further admits that in response to said order, said S. W. Slayden, the then owner and holder of said notes to O. Bailey, described in paragraph second of complainant's bill, filed in said cause his petition of intervention and claimed the payment of his said indebtedness out of said fund, and showed in his said petition that the said notes were secured by the deed of trust executed by W. E. Dupree to W. W. Lastinger as trustee; and he admits that said Standing Master made his report in said cause, and recommended that certain creditors secured by the deed of trust to J. C. Birkhead, trustee, as aforesaid, be subrogated to the lien which said S. W. Slayden held by virtue of the deed of trust to said Lastinger, of date December 31, 1894, on the real estate described therein. And he further admits that on the 26th day of June, 1897, the said Circuit Court entered its final decree in said consolidated cause, awarding to the said S. W. Slayden the amount due him on said notes (of which

three were still unpaid) to be paid out of the proceeds of the sale of property conveyed in said deed of trust of December 3, 1896, and directed that said notes, being three for nine hundred dollars each, should, upon payment of the amount thereof to said S. W. Slayden, be by him indorsed without recourse and delivered to the receiver in said cause, who was then directed to sell said notes and to pay the proceeds thereof into the registry of said court to be applied as funds in said cause. And in this connection, this defendant avers that the said final decree, to which both of the complainants herein were parties, did, as this defendant is advised and believes and alleges, award to the S. W. Slayden payment out of the fund then in the registry of the Court in priority to other creditors only on the condition that the security which the said S. W. Slayden held on other property not covered by said deed of trust to Birkhead, and which other property was the property described in the second paragraph of complainant's bill, should be surrendered to the receiver, to be by him sold for the benefit and reimbursement of the fund out of which the said S. W. Slayden was claiming payment under the provisions of the said deed of trust to Birkhead. And your defendant

19 in this connection specially avers that the complainants were parties to said decree. That neither of the complainants herein made any objection to the said order and decree, and neither of the complainants in or about said proceeding claimed any right to have the said property described in the second paragraph of complainants' bill relieved of the indebtedness on it by payment out of said fund; and neither of said complainants suggested that the provisions of said decree were inequitable or unjust as to them, or any other person, and that neither of said complainants has ever appealed from siad decree. And this defendant further admits that the said S. W. Slayden received the full amount of his indebtedness against W. E. Dupree, and indorsed and delivered said notes to the said receiver, who thereafter sold the same to one J. C. Duke for the sum of three hundred dollars. And in this connection this defendant avers and charges that the sale to the said J. C. Duke was duly confirmed by the Court; and further that the said J. C. Duke purchased said notes for and on behalf of Mansur & Tebbetts Implement Company, Washburn & Moen Manufacturing Company and Southern Rock Island Plow Company, all of whom were creditors of W. E. Dupree, and whose liens and claims against the fund in the registry of the Court out of which the said S. W. Slayden was paid in full, were adjudged by said decree to be subordinate to the lien of said S. W. Slayden and other creditors classified in said decree as of the first class, second class, fourth class and fifth class. And in this connection this defendant avers and charges that the said creditors in the fifth class of said decree, including the said S. W. Slayden, were paid in full out of the fund in the registry of the Court at the time said decree was made; but to the creditors in the sixth class, to which class belonged the said Southern Rock Island Plow Company, Mansur & Tebbetts Implement Company, and Washburn & Moen Manufacturing Company, there was paid only about forty per cent. of their claims. And the said creditors mentioned as the beneficiaries of the purchase of J. C. Duke, still have unsatisfied claims

under said decree against W. E. Dupree amounting to at least twenty thousand dollars. The defendant further admits that C. W. Mansur now claims to own and hold said notes formerly held by S. W. Slayden, by, under and through the said J. C. Duke by virtue of his purchase of the same as hereinbefore set out. And in this connection the defendant says that the said C. W. Mansur, defendant, has become, in succession to said J. C. Duke, the trustee for John Deere Plow Company, successor to Mansur & Tebbetts Implement Company, and for the said Southern Rock Island Plow Company and for the said Washburn & Moen Manufacturing Company.

20 The defendant denies that the said J. C. Duke never acquired any title to the said notes by the proceedings set out in complainants' bill, and never acquired any right or claim to the lien or mortgage or trust deed evidenced by the instrument executed by W. E. Dupree to W. W. Lastinger, trustee; and denies that any of the facts set forth in complainants' bill operated as a discharge of said indebtedness, and denies that the action of the said United States Circuit Court was not binding on Mollie E. Dupree. And in this connection he avers, that, as he is informed and believes and charges, the said decree was in all things binding on the said Mollie E. Dupree, and that the same is not subject to collateral attack by her, nor any other party thereto; and that the said decree is in full force and effect, and has never been vacated, annulled or set aside as to either of the complainants herein, and is as to them, fully binding and operative.

9. The defendant admits the allegation of the eighth clause of the complainants' bill, respecting the institution of a suit in the Nineteenth District Court of Texas, and the dismissal thereof.

10. The defendant admits the allegations of the ninth paragraph of the amended bill, so far as the same relates to the bringing by the said J. C. Duke of a bill in the United States Circuit Court for the Northern District of Texas against the complainants herein, and the demurrers interposed thereto, and he admits that on hearing of the demurrers that the Court sustained the same and ordered the bill dismissed without prejudice. And in this connection the defendant avers that the only demurrer considered by the Court, as he is informed and believes, was the demurrer to the jurisdiction of the Court growing out of the citizenship of the parties, all the parties thereto being citizens of the State of Texas. The defendant further admits that an appeal was taken by the said J. C. Duke to the United States Circuit Court of Appeals, and that in said Court the decree of the Circuit Court dismissing said bill was affirmed. But the defendant denies that the effect of said proceeding affected in any way the merits or equity of the said J. C. Duke, and as he is informed and believes and avers, constitute no bar to such further proceedings as the said J. C. Duke might take, or his successor, the defendant, C. W. Mansur, might take toward the collection out of the property mentioned in the second paragraph of complainants' bill of the money paid to S. W. Slayden under the final decree of the United States Circuit Court hereinbefore mentioned. And the defendant especially denies that the said notes and the said deed of trust and the lien thereof have been extinguished and annulled, or in any [way] affected.

21 11. The defendant admits that C. W. Mansur, the defendant, claims to be the owner and holder of said notes as the successor to J. C. Duke, and by assignment or indorsement from the said J. C. Duke for the benefit of the persons hereinbefore mentioned, and that as such he is seeking to enforce the deed of trust of date December 31, 1894, against the property described therein, and that under the terms of said deed of trust, he has caused a substitute trustee (the defendant, A. S. Keady) to advertise the property as charged, and was proceeding to have the same sold by the said A. S. Keady when complainants' bill herein was exhibited and the injunction herein was awarded. And the defendant avers that the said property would have been sold but for the injunction awarded herein.

12. And the defendant denies all and all manner of unlawful combination and confederacy wherewith he is by said bill charged without this that there is any other matter, cause or thing in said plaintiffs' bill of complaint contained, material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed or avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and approve, as this Honorable Court shall direct, and humbly pray to be hence dismissed without his reasonable costs and charges in this behalf most wrongfully sustained.

C. W. MANSUR,
J. M. MCCORMICK, *Solicitor.*

(Indorsed:) No. 274 In Equity. Answer by C. W. Mansur to Complaints' Amended Original Bill. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Filed 6th day of June, 1904. D. H. Hart, Clerk. By Scott W. Key, deputy.

22 *Replication of Complainants to Answer of the Defendants.*

Filed January 2d, 1905.

In the United States Circuit Court for the Western District of Texas, at Waco.

In Equity. No. 274.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Replication of complainants in above cause to the answer of C. W. Mansur and A. F. Keady to the defendants in above cause.

This repliant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto saith that he will aver and prove his said bill to be true and sufficient

and that the said answer is untrue and insufficient; wherefore he prays relief as is said bill set forth.

W. E. DUPREE,
MOLLIE E. DUPREE,
By SLEEPER & KENDALL,
Their Solicitors.

(Indorsed:) No. 274. W. E. and M. E. Dupree *vs.* C. W. Mansur and A. S. Keady. Replication of W. E. and M. E. Dupree to the joint and several answer of defendants. Filed 2d day of January, 1905. D. H. Hart, clerk. By L. B. McCulloch, deputy.

23 *Cross Bill of C. W. Mansur.*

Filed February 22, 1904.

Circuit Court of the United States for the Western District of Texas, at Waco.

No. —. In Equity.

C. W. MANSUR, Cross Plaintiff,
vs.
W. E. DUPREE and M. E. DUPREE, Cross Defendants.

To the Honorable Judges of the United States Circuit Court for the Western District of Texas:

C. W. Mansur, of St. Louis, and a citizen of the State of Missouri, hereinafter called orator, brings this his cross bill against M. E. Dupree and W. E. Dupree, hereinafter styled defendants, both of whom are residents of the County of McLennan, and citizens of the State of Texas, and inhabitants of the Western District of Texas. And thereupon your orator complains and says:

1. That, heretofore, to-wit: On the 2d day of November, 1903, the said defendants filed their certain bill in the District Court of McLennan County, Texas, against your orator and one A. S. Keady, wherein they prayed for an injunction against your orator and said A. S. Keady, enjoining them and commanding them to desist from making a sale of the real estate hereinafter mentioned for the purpose of paying off three certain promissory notes executed originally by the defendant, W. E. Dupree, to the order of S. W. Slayden and secured by deed of trust on said property, which said notes and deed of trust are hereinafter more particularly described. That the said defendants exhibited their said bill to the District Judge of McLennan County, Texas, and procured from him a fiat for the issuance of an injunction as prayed for, upon the execution of an injunction bond in the sum of two hundred and fifty dollars. That the said defendants executed said bond on the 2d day of November, 1903, and on the same day a writ of injunction issued from the District Court of McLennan County in the terms prayed for in said bill; and said

injunction was duly served on the said A. S. Keady, and your orator was duly notified of said injunction. That thereafter this cause was removed from the District Court of McLennan County by your orator and the said A. S. Keady, and the transcript of the record
24 from said State Court has been filed herein, and your orator and said Keady have filed their answer to said original bill.

2. That heretofore, on the 31st of December, 1894, the defendant, W. E. Dupree, in payment for an undivided one-half interest in lot No. — Block 2, City of Waco, executed his certain five promissory notes described as follows:

Each note dated December 31, 1894, and due 1, 2, 3, four and five years thereafter respectively, with eight per cent. annual interest, signed by said W. E. Dupree, and payable to O. Bailey, or order, with current rate of exchange on New York, with interest thereon at the rate of eight per cent. per annum until fully paid, said interest payable annually on the 1st day of January in each and every year according to the terms of interest coupon notes, thereto annexed, with a special agreement in making and delivery of said notes that if any one of the annexed interest coupons remains unpaid for five days after maturity thereof, at the option of said O. Bailey or the owner of said promissory notes, the whole principal with interest then accrued, shall at once become due and payable, and the holder may proceed to collect the same by sale under the deed of trust that day executed, or otherwise as such holder may elect.

And on the same day, that is to say, December 31, 1894, the said defendant, W. E. Dupree, for the purpose of securing said promissory notes, executed a trust deed or mortgage with power of sale on an undivided one-half interest in and to lot No. 1, in Block 2, in the city of Waco, State of Texas, in McLennan County, as shown by the map of said city. Said lot No. 1 in Block 2 fronts fifty feet on Bridge street and runs back 165 feet to the alley. Said mortgage or trust deed, in which one W. W. Lastinger was named as trustee, further provides that in case of any failure or default on the part of W. E. Dupree to keep or perform any of the covenants or agreements therein contained, the said W. E. Dupree authorized and empowered the said trustee and made it his special duty, at the request of the holder of said notes at any time after default, to sell the said property in said deed of trust described, at public or private sale, and apply the proceeds first, to the payment of the expenses of the sale; second, to the payment of the indebtedness in default, together with all interest thereon, and taxes and insurance on the property, and next, to the payment of a fee to the trustee for making the sale, and the remainder to be returned to the grantor in the trust deed, or his order. Said instrument contained a power in the holder of said notes to appoint a suitable trustee, in the case of the failure of said
25 Lastinger to act, and contained other provision not necessary here more particularly to set out, but a certified copy of said instrument, for the information of the Court will be produced unless admitted and prayed to be considered in connection with the allegations of this bill, and will be used on the trial of this cause as evi-

dence on behalf of complainant. The deed from O. Bailey to W. E. Dupree of said land retained a vendor's lien to secure said notes.

That after the execution of said notes and said trust deed and the delivery thereof to the said O. Bailey, he, the said O. Bailey, transferred and indorsed said notes to S. W. Slayden who was the owner and holder thereof on the 5th day of December, 1896, as well as on the 3rd day of December, 1896.

That on the 3rd day of December, 1896, the defendant, W. E. Dupree, being largely indebted and being insolvent and in a failing condition, executed a certain mortgage or trust deed, with power of sale, and delivered the same to J. C. Birkhead, trustee, for the purpose of securing the indebtedness due by said W. E. Dupree to his creditors named in said instrument preferentially and in accordance with the provisions thereof, and conveyed by said instrument of date December 3, 1896, certain stock of goods, wares and merchandise, horses, wagons, sewing machines, and other personal property, and also real estate (but not the real estate covered by said mortgage of December 31, 1894, hereinbefore mentioned), situated in the Counties of McLennan, Hill and Falls, in the State of Texas, and provided in said trust deed or mortgage executed to J. C. Birkhead as trustee, that the trustee should take immediate and exclusive possession of all said property, inventory the same, and sell the same, and apply the proceeds of the sale of said property substantially as follows: viz, first to the payment of the claims of certain creditors named therein, whose claims amounted to about the sum of $38,160.14, and among whom were included said S. W. Slayden, whose claim consisted of the notes secured by said trust deed of date December 31, 1894, and who had no other claim against the said Dupree or said estate, the class of creditors in which said S. W. Slayden was placed being enumerated in the exhibit to said trust deed, called Exhibit A. After payment of the claims of Exhibit A, in full, with interest, out of the proceeds were then directed to be paid certain creditors of the said W. E. Dupree, including Mansur & Tebbetts Implement Company, a corporation domiciled at St. Louis, Missouri, and Washburn & Moen Manufacturing Company, a corporation domiciled at Worcester Massachusetts. The claim of the creditors mentioned amounting to about the sum of $54,877.79, and under the provisions of said
26 trust deed these creditors, listed in Exhibit B to said trust deed, were to be paid ratably and to pro-rate amongst themselves, if there should not be sufficient proceeds left after paying off the creditors classified in Exhibit A.

And the said instrument then directed that after the payment in full of creditors listed in Exhibit A, and also the payment in full of the creditors listed in Exhibit B, that if there should still remain proceeds, the same should be paid to certain creditors of the said W. E. Dupree listed in Exhibit C, whose claims amounted to about the sum of $118,574.05, who would pro-rate in whatever proceeds there might be, arising under the trust deed, after payment of the creditors in said trust deed preferred respectively in the lists Exhibits A and B, aforesaid.

3. That on the 5th day of December, 1896, the said Mansur &

Tebbetts Implement Company and the said Washburn & Moen Manufacturing Company brought their bill in the United States Circuit Court, which had jurisdiction thereof, against W. E. Dupree, the defendant herein, and against J. C. Birkhead and against Provident National Bank, which was one of the preferred creditors in said instrument, of date December 3, 1896, and prayed for an establishment of their indebtedness against W. E. Dupree, for the removal of said Birkhead as trustee, for the appointment of a receiver for the property conveyed to said Birkhead, trustee, that as against said Provident Bank there should be a marshalling of securities, alleging that said Provident Bank held other security for its indebtedness on which the complainants in said bill had no lien; alleging further that the property in the hands of the trustee was inadequate and insufficient to pay in full the complainants in the bill under the provisions in said trust deed; and that the provisions of said trust deed be carried out in so far as the same provided security through the decree of the Court and the administration of a receiver, and for general relief.

And on the 5th day of December, 1896, Frank F. Finks, Esq., was appointed receiver of the property, then in the hands of Birkhead, trustee, by this Honorable Court, and said Finks immediately qualified by execution of bond as required by the order appointing him, and took the oath of office.

4. That afterwards, on December 9, 1896, W. B. Belknapp & Company, one of the creditors of said W. E. Dupree mentioned in said instrument of December 3, 1896, and in Class C thereof, exhibited his bill in this honorable Court against W. E. Dupree and J. C. Birkhead and Provident National Bank and S. W. Slayden and
27 the Rosebud Furniture Company and Mollie E. Dupree, the other defendant herein, and James B. Baker, and reiterated in substance the allegations of the bill heretofore filed by the said Mansur & Tebbetts Implement Company, and the said Washburn & Moen Manufacturing Company, jointly, and in addition to said allegations alleged that the said Slayden held other securities than the property mentioned in said trust deed of December 3, 1896, and on which the said Belknapp & Company possessed no lien and that out of the securities held by the said Slayden other than the property mentioned in the said instrument of December 3, there was abundance in value to pay his claim and prayed that the receivership theretofore granted be sustained and be made permanent and for marshalling of the securities held by the said Slayden and others, so that the rights of said Belknapp & Company and the other creditors mentioned in said instrument of December 3, 1896, might be protected in as much as the said Slayden held a lien on two funds, only one of which was available to the said Belknapp & Company, and the other creditors mentioned in said instrument of date December 3, 1896, and for general relief.

On a hearing had before the Honorable Charles Swayne, the receivership was made permanent and on the 12th day of December, 1896, a general order was made permitting the filing of interventions by persons interested in the property in the hands of the receiver and on the same day an order of reference of intervention

was made directing that the same be heard by the Standing Master. And on the 30th day of January, 1897, the said S. W. Slayden filed his answer to said bill of Belknapp & Company under oath admitting that he was owner of four of the notes mentioned in said instrument of December 31, 1894, and that he had accepted the provisions of the instrument of December 3, 1896, as additional security for his debt against the defendant, W. E. Dupree, praying that his claim be established as a charge on the property in the hands of the receiver, in accordance with the terms of the trust deed of December 3, 1896.

5. That on the 8th day of February, 1897, the receiver recommend that the personal property in his hands and custody be sold and on the same day an order was made directing the receiver to sell the personal property in his hands which, in due course, was sold and the receiver reported that his total receipts from the sale amounted to $62,829.22, and that the net amount realized after the payment of expenses was $54,474.44. That the total net proceeds of all property in the hands of the receiver were only sufficient to pay the creditors of W. E. Dupre listed in said Exhibit B the sum
28 of twenty per cent of their recoveries and insufficient to pay to the creditors listed in said Exhibit C any part of their recoveries.

6. That on the 9th of March, 1897, the Judge in said cause made an order requiring that all parties claiming any interest in the proceeds of the sales of property made by the receiver should present their claims by intervention in the cause on or before the rule day in April, 1897, and in default thereof should thereafter be barred and precluded from participating in the distribution of the said proceeds, and further providing that each party should disclose under oath a description of any and all security that he might have for the payment of his claim and such claim be referred to the Master for his report.

That in response to said order the said S. W. Slayden filed a petition of intervention in said cause and receivership, (the said two bills in equity having been heretofore consolidated by order of the Court) and claimed the payment of his indebtedness out of the fund then in the hands of the receiver and showed to the Court under oath that he held the security of the said trust deed of December 31, 1894, in addition to his claim on the fund in the Court.

7. That the said W. E. Dupree and also the said M. E. Dupree, defendants, herein, were original parties in said consolidated suit. That in addition thereto, the said Mollie E. Dupree joined, by her husband, W. E. Dupree, filed her intervention in the consolidated suit and also filed their answer to said bill exhibited against them by W. B. Belknapp & Company, and all of said parties were fully before said Court, and fully represented therein. And on the 3rd day of December, 1896, said W. E. Dupree had conveyed the said lot No. 1, Block 2, of Waco, to defendant, M. E. Dupree by voluntary deed without valuable consideration.

8. That on the 3rd day of May, 1897, after having heard the various interventions and claims against the funds in the Court in said consolidated cause, the Standing Master, A. S. Lathrop, reported

to this Honorable Court, and amongst other matters reported by him found in his said report in favor of the said S. W. Slayden for the amount of his notes aforesaid, that he was entitled to be paid out of the fund in Court in preference to all creditors listed in Exhibit B and C in said instrument of date December 3, 1896, and that the creditors listed in said Exhibit B and C be subrogated to the lien which said Slayden held by virtue of said trust deed of date December 31, 1894, on the said real estate therein described.

29 9. That on the 20th day of June, 1897, the said consolidated cause came on to be heard upon the bills, answers, pleas of intervention, Master's report and exceptions thereto, and the evidence, and this Honorable Court entered its final decree in said consolidated cause, and amongst other awards therein awarded and decreed to the said S. W. Slayden a recovery and judgment against the said W. E. Dupree on his said notes and claim for the sum of $3,085.50, with interest on $2,805.00 thereof at the rate of eight per cent per annum, together with his costs in that behalf incurred with a lien on the fund in the registry of the Court, with priority thereon to all claims of the said creditors listed in Exhibit B and C of said instrument, dated December 3, 1896, and further in decree provided as follows: "And it further appearing to the Court that the debt of the said S. W. Slayden against the said W. E. Dupree consists of vendor's lien notes executed by said W. E. Dupree to O. Bailey and transferred by indorsement of the said O. Bailey to the intervener, S. W. Slayden, all dated December 31, 1894, each in the sum of $900.00, the first maturing January 1, 1898, the second maturing January 1, 1899, and the third maturing January 1, 1900, and bearing interest at the rate of eight per cent. per annum, payable annually and evidenced by interest coupons attached to said notes, said notes being secured by a vendor's lien on Lot 1, in Block 2, of the city of Waco, McLennan County, Texas, it is hereby ordered that upon payment to the said intervener of his recovery out of the funds in the registry of the Court, the said intervener shall at once deliver to F. F. Finks, receiver herein, said notes and said interest coupons thereon, indorsed to the said receiver without recourse, and the said F. F. Finks, receiver, is hereby ordered forthwith to sell said notes and interest coupons at public or private sale for cash, and pay the net proceeds of said sale into the registry of this Court to be applied as the other funds in the registry of this cause."

10. Thereafterwards out of the funds then in the registry of this Court, in said consolidated cause, the said S. W. Slayden did receive the full amount of the principal and interest on said notes and coupons, and did then in pursuance to said decree indorse and transfer said notes to the said F. F. Finks, receiver, and the said F. F. Finks did thereupon in pursuance of said decree expose said notes for sale in all things in accordance with directions to him in said decree contained, and J. C. Duke, Trustee, at such sale purchased said notes together with the interest coupons thereon for the sum of $300.00, and the said Frank F. Finks did report to said United States

30 Circuit Court in his final report the sale of said notes and coupons by including therein the amount realized therefrom,

to-wit: the sum of $300.00, which was paid to him by said J. C. Duke, which said report of the said receiver was confirmed and approved, and said receiver was discharged upon the payment into the registry of the Court of the moneys in his hands, including said $300.00 paid him by your orator, and the said Frank F. Finks did indorse said notes and said coupons to J. C. Duke, who purchased said notes as the trustee for Mansur & Tebbetts Implement Company, Washburn & Moen Manufacturing Company and Southern Rock Island Plow Company, who were creditors of said W. E. Dupree, secured by said deed of trust to Birkhead. That your orator is the successor of said Duke as trustee, and is now the owner and holder thereof. That your orator in succession to the said J. C. Duke holds the said notes and the liens to secure them, as trustee of an express trust, for the benefit of John Deere Plow Company, Washburn & Moen Manufacturing Company and Southern Rock Island Plow Company. John Deere Plow Company is the successor to Mansur & Tebbetts Implement Company.

11. That the matter in dispute in this cross bill is of a civil nature, and exceeds in value the sum of two thousand dollars, exclusive of interest and costs.

12. Your orator would further represent that the defendants, W. E. Dupree and M. E. Dupree, now claim that the performance of said decree in accordance with the terms thereof did not operate as a subrogation of the lien held by S. W. Slayden on said Lot 1, Block 2, in the city of Waco, but operated as a payment and discharge of said indebtedness and a release of said lien, and are claiming that said notes have been fully paid off and the lien thereon fully discharged, and that no indebtedness or lien exists in favor of your orator or any other person by occasion of the execution of said notes and the lien given by said deed of trust of date December 3, 1894, or the vendor's lien retained in said notes.

13. And for as much as your orator can have no adequate relief except in this Court, and to the end therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, according to the best of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the averments of this bill, your orator
31 prays that the said defendants may be cited and compelled to answer this bill, but not under oath (answer under oath from the defendants and each or either of them being hereby expressly waived); and on a hearing may it please the Court to grant a decree establishing the amount of your orator's indebtedness against the defendant, W. E. Dupree, and that the said trust deed hereinbefore mentioned, on an undivided one-half interest in and to Lot No. 1, Block No. 2, in the city of Waco, as shown by the map of said city, in which W. W. Lastinger was named as trustee, and to secure the notes which are described in said trust deed, be decreed to be a valid and existing lien upon the property described therein, to secure the payment of the indebtedness aforesaid and that the vendor's lien retained in said notes also be established; and that the said W. E. Dupree and M. E. Dupree be decreed to pay unto your orator the said indebtedness, and in default thereof that the defend-

ants, and all persons claiming under them, or either of them, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises and every part and parcel thereof; and that all and singular the said mortgaged premises, with appurtenances, property, effects, rights and immunities incident thereto, may be sold under the decree of this Honorable Court, and that out of the moneys arising from the sale thereof, that your orator's said indebtedness, together with interest thereon then unpaid and the costs of this suit, may be paid.

And your orator further prays that the original bill herein filed by the said defendants, M. E. and W. E. Dupree, against your orator and A. S. Keady be retained by this Court until a final hearing of this bill, and that the complainants therein be not permitted to dismiss said original bill, because of the effect that such dismissal would have on the rights of your orator in this bill to have the matters herein mentioned determined in this Honorable Court.

And your orator further prays that your Honors may grant unto your orator a writ of subpœna from the United States of America issued out of and under the seal of this Honorable Court, directed to W. E. Dupree and M. E. Dupree, commanding the said W. E. Dupree and the said M. E. Dupree, and each of them, at a certain time and under a certain penalty therein to be named, personally to be and appear before this Honorable Court, and there to answer all and singular, but not under oath (answer under oath being hereby expressly waived), the matters aforesaid, and to stand
32 and abide by and sustain such direction and decree as shall be made herein as to your Honors shall seem equitable and just.

14. Your orator prays for such further relief in the premises as the nature and circumstances of this case may require, and as to this Honorable Court may seem meet and proper. And your orator as in duty bound will ever pray.

C. W. MANSUR,
By McCORMICK & SPENCE,
His Solicitors.
JOSEPH M. McCORMICK AND
WENDEL SPENCE, *Of Counsel.*

[Indorsed:] No. 274. Eq. W. E. and M. E. Dupree *vs.* C. W. Mansur and A. S. Keady. Cross Bill of C. W. Mansur. Filed 22 day of February, 1904. D. H. Hart, clerk. By L. B. McCulloch, deputy.

Demurrers to Cross Bill of C. W. Mansur.

Filed April 30th, 1904.

In United States Circuit Court, Western District of Texas, at Waco.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

The Joint Demurrer of W. E. Dupree and M. E. Dupree, His Wife, to the Cross Bill of Defendant, C. W. Mansur.

These *defendants* respectively by protestation not confessing or acknowledging all or any of the matters and things in said defendant's cross bill to be true in such manner and terms as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer showeth:

(1.) That the said defendant, C. W. Mansur, has not in and by said bill made or stated such a cause as doth or ought to entitle him to any such relief as is thereby sought and prayed for of or against these defendants.

(2.) That it appears from said cross bill that there are
33 divers other persons who are necessary parties to the said bill but who are not made parties thereto and in particular it appears that John Deere Plow Co., Washburn & Moen Mfg. Co. and Southern Rock Island Plow Co. are alleged to be equitable owners of said notes described in said cross bill but neither of them are made parties thereto.

(3.) That it does not appear from said cross bill that in the intervention of said Slayden, as set out in paragraph six of said cross bill, any issue in the pleadings was ever made by either of the complainants or any creditor in said consolidated cause setting up a claim of subrogation to such lien and it does not appear that there were any pleadings on which to base the finding of the Master as set out in paragraph nine of complainants' said bill.

(4.) That it does not appear from said cross bill that there were any pleadings in said consolidated causes by any complainant or any creditor therein on which to base the decree in said causes as set out in paragraph nine of said cross bill and no such relief as by said portion of said decree so set out in said paragraph nine is granted appears to have been asked or prayed for by any party to said causes.

(5.) That it does not appear from said cross bill that by the order of reference to the Master as set out in paragraph six of said cross bill, he was directed or authorized to enquire into or report to the Court, the rights of complainants or creditors in said consolidated cause to be subrogated to the said S. W. Slayden's lien

securing said notes, nor does it appear from said cross bill that he was directed to make any investigation or report, from which authority to report on said subrogation as set out in paragraph eight of said cross bill could be inferred.

(6.) That it does not appear from said cross bill that these defendants or either of them was served with subpœna on or had any notice of any issue made in the intervention of S. W. Slayden in said consolidated causes, of the rights of complainants therein or creditors to be subrogated to the lien held by said Slayden to secure the payment of said notes.

(7.) That it appears from said cross bill in paragraph seven thereof, that on December 3, 1896, said W. E. Dupree had conveyed to M. E. Dupree said Lot One, Block Two of Waco, and that all the proceedings set out in said bill occurred subsequent
34 thereto and it does not appear from said bill that by any pleadings to which said M. E. Dupree was a party, any relief was sought having for its object the subrogation of the complainants or creditors in said consolidated causes, to the vendor's lien or Deed of Trust set out in paragraph two of said cross bill, nor does it appear from said bill that there was any adjudication by the decree in said consolidated cause in respect to the right of M. E. Dupree, or interest, in said Lot One, Block Two of Waco.

(8.) That said cross bill shows no reason why a specific decree of subrogation and foreclosure in favor of said complainants or creditors was not rendered in the original decree, although it appears from paragraph two of said cross bill that by the act of said W. E. Dupree in giving the Trust Deed as set out therein and the act of said S. W. Slayden in accepting the same, as set out in said cross bill, said notes were matured and said Slayden entitled to the full payment thereof out of said property, conveyed in said Deed of Trust of December 3, 1896.

(9.) That it does not appear from said cross bill, as set out in paragraph four thereof, what the "other securities" held by said S. W. Slayden consisted of, and which by the prayer in *a* said consolidated causes were sought to be marshalled in order to preserve the rights of complainants and other creditors mentioned in said bill of Belknap & Co., and it is not shown that such "other securities" are specifically mentioned in said bill of said Bel-nap & Co.

(10.) That it appears from said cross bill that complainant therein sues as assignee of the notes described in said cross bill and it does not appear that the original payee of said notes and montgage could sue in this Court and it does not appear that this Court has jurisdiction of the cause of action set out in said cross bill.

(11.) That it appears from said cross bill that all of said notes set out and described in said cross bill and the Deed of Trust set out and described *in* therein matured more than four years before the filing of said cross bill and that the right of complainant in said cross bill to maintain the same is barred by the statute of four years' limitation, which is here now pleaded by the way of exception and demurrer.

Wherefore *defendants* respectfully demand the judgment of this

Honorable Court whether they shall be compelled to make
35 any further or other answer to said bill or any of the matters or things therein contained and prayed to be hence dismissed with their reasonable costs in this behalf sustained.

W. E. DUPREE,
MOLLIE E. DUPREE,
By SLEEPER & KENDALL,
Their Solicitors.

STATE OF TEXAS, *County of McLennan:*

W. E. Dupree, for himself and as the agent and representative of his wife, M. E. Dupree, makes solemn oath and says that the foregoing demurrer is not interposed for delay.

W. E. DUPREE.

Sworn to and subscribed before me this, the 30th day of April, 1904.

[SEAL.] D. H. HART, *Clerk*,
By L. B. McCULLOCH, *Deputy*.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. M. SLEEPER,
Of Counsel for W. E. Dupree and M. E. Dupree.

(Indorsed:) No. 274 Equity. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Demurrers to Cross Bill of Defendant, C. W. Mansur. Filed 30th day of April, 1904. D. H. Hart, clerk. By L. B. McCulloch, deputy.

36 *Order Overruling Demurrers of Complainants to Cross Bill of Defendant C. W. Mansur.*

Filed Nov. 26, 1904.

United States Circuit Court, Western District of Texas, Waco Division.

No. 274. In Equity.

C. W. MANSUR ET AL.
vs.
W. E. DUPREE ET AL.

This day came on to be heard the demurrers of the complainants to the cross bill filed her-in by C. W. Mansur, and argument thereon having been heard and considered, the Court is of the opinion that said demurrers should be overruled. It is therefore ordered adjudged and decreed that the said demurrers of the complainants to the cross bill of C. W. Mansur be, and the same are hereby, over-

ruled, and it is further ordered that the complainants are allowed until Rule day in January, 1905, to answer said cross bill. It is further ordered that the complainants may file their replication to the defendant's answer by or before the said Rule day in January, 1905.

Given in open Court this 26th day of November, A. D. 1904.

T. S. MAXEY,
United States District Judge.

(Endorsed:) In the Circuit Court of the United States for the Western District of Texas. At Waco. No. 274. In Equity. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Order overruling Demurrers of Complainants to Cross Bill of Defendant, C. W. Mansur. Filed and entered 26th day of November, A. D. 1904. D. H. Hart, clerk. By L. B. McCulloch, deputy.

37 *Answer of Cross Defendants to Cross Bill of C. W. Mansur.*

Filed Jan. 2, 1905.

In the United States Circuit Court for the Western District of Texas, at Waco.

No. 274. In Equity.

C. W. MANSUR, Cross Plaintiff,
vs.
W. E. DUPREE & MOLLIE E. DUPREE, Cross Defendants.

The joint and several answers of Mollie E. Dupree and W. E. Dupree, the defendants, to the cross bill of Complainants, C. W. Mansur.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Texas:

These defendants to said cross bill respectively now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can be or may be had or taken to the many errors, uncertainties and imperfections in the said cross bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1. These defendants admit that the allegations as set out in the first paragraph of the said cross bill are true.

2. These defendants admit the execution of the five promissory notes by the defendant, W. E. Dupree in payment for an undivided one-half interest in lot No. 1, block No. 2, city of Waco, Texas, as set forth and alleged in the second paragraph of the said cross bill of complaint of C. W. Mansur; they also admit that for the purpose of securing said promissory notes, the de-

fendant, W. E. Dupree on December 31st, 1894, executed a trust deed or mortgage with power of sale on said undivided one-half interest in and to said lot No. 1, in block No. 2, in the city of Waco, McLennan County, Texas, as shown by map of said city, said lot fronting 50 feet on Bridge Street and running back 165 feet to the alley, and that one W. W. Lastinger was named trustee therein, and that the same further provides that in case of any failure or default on the part of defendant W. E. Dupree to keep or perform any of the agreements therein contained, the said W. E. Dupree authorized and empowered the said trustee, and made his especial duty, at
38 the request of the said O. Bailey or other holder of said notes, at any time after default as aforesaid, to sell said property in said deed of trust described, at public or private sale, and apply the proceeds first to the payment of the expenses of the sale, second, to the payment of the indebtedness in default, together with all interest thereon, and taxes and insurance as aforesaid, with interest; and third, to the payment of a fee to the trustee for making the sale, and the remainder of the money, if any, to hold subject to the order of said W. E. Dupree. These defendants deny that said instrument contained a power in the holder of said notes to appoint a substitute trustee in case of the failure of said Lastinger to act. They allege the fact to be that said instrument or deed of trust provided that should the said W. W. Lastinger trustee, fail or refuse or to be disqualified from acting thereunder, the said O. Bailey, or his legal representatives, should have full power to appoint a substitute in writing, who should have the same powers delegated therein to said W. W. Lastinger, trustee. These defendants further admit that the deed from O. Bailey to W. E. Dupree for said land and property, retained a vendors lien to secure said notes, as set forth in said paragraph 2 of said cross bill of complaint, and that after the execution of said notes and said trust deed and delivery thereof to said O. Bailey, he the said O. Bailey, transferred and endorsed said notes to S. W. Slayden; and these defendants further admit that on the 5th day of December, 1896, and on the 3rd day of December, 1896, said S. W. Slayden held four of said notes, but they aver that one of said notes, to-wit, the note which fell due on December 31, 1895, or January 1, 1896, had been paid off and discharged by said W. E. Dupree before the dates mentioned. These defendants further admit that on the 3rd day of December, 1896, defendant W. E. Dupree was largely indebted, and unable to meet his obligations as they fell due, and that on said date he executed a certain mortgage or trust deed with power of sale, and delivered the same to J. C. Birkhead as trustee named therein, for the purpose of securing his indebtedness to his creditors named in said instrument, preferentially, and in accordance with the provisions thereof, and that thereby he conveyed the property mentioned and set out by plaintiff in his said cross-bill on page three thereof, and that said instrument provided that said trustee should take immediate and exclusive possession of all said property, and inventory and sell the same, and apply the same substantially as alleged in said cross bill, to the payment of the claims of certain creditors named

in said trust deed, first, whose claims amounted to about the
39 sum of $38,160.14, among which was included the claim of said S. W. Slayden represented by the four unpaid notes secured by said trust deed of date December 31, 1894, and that the said Slayden had no other claim against said Dupree or the estate conveyed by said trust deed, and that said Slayden's claim was included among those enumerated in exhibit A of said trust deed; that said deed of trust provided that after the payment of the claims in exhibit A in full, out of the proceeds, certain other creditors of said Dupree including Mansur & Tebbetts Implement Company, and Washburn & Moen Manufacturing Company, were then to be paid, which claims were in exhibit B in said trust deed, and that the claims in said exhibit B amounted to about the sum of $54,877.79.

These defendants admit that the allegations contained in the latter part of page 4 of said cross bill in respect to the manner in which the said creditors were to be paid, by the terms of said trust deed, are substantially true.

3. These defendants further admit that the allegations contained in paragraph three on page five of said cross bill are substantially true.

4. These defendants further admit that W. B. Belknapp & Co., one of the creditors of said W. E. Dupree, mentioned in said instrument of December 3, 1896 and in class C thereof, exhibited its bill as alleged in paragraph four of plaintiff's cross bill, but they allege that securities referred to and set out and described in said bill as held by said Slayden in addition to the security mentioned in said instrument of December 3, 1896, did not include or have any reference whatever to the vendors lien or deed of trust on lot 1 in block 2 in the city of Waco, and upon which plaintiffs are now seeking to obtain a foreclosure in said cross bill. They aver that the securities set out and described in said bill of Belknap & Co., consisted of collateral notes and other securities of like nature alleged to have been deposited by defendant W. E. Dupree with said S. W. Slayden under a contract between said W. E. Dupree and said Slayden whereby said Slayden had full and complete right to collect said collateral securities, and appropriate the proceeds to the payment of the indebtedness of said W. E. Dupree to said Slayden, set out in said deed of trust of Dec. 3, 1896, it being alleged in said bill of said Belknap & Co., that said collateral security consisted of negotiable promissory notes made by solvent farmers and other persons, and other evidences of indebtedness derived by defendant Dupree from the operation of his business, and notes realized from fraudu-
40 lent sale of real estate in fraud of his creditors; and the prayer of said bill of Belknap & Co., as against said Slayden was that said Birkhead trustee be enjoined from paying any indebtedness of said Dupree to said Slayden out of the proceeds of the property conveyed to him in trust, until said Slayden had fully and completely exhausted the collateral securities held by him to secure the indebtedness owing to him by said Dupree.

These defendants further aver that the said Belknap & Co., in their said bill did not seek any relief whatever as against the defendant Mollie E. Dupree in respect to said lot 1 in block 2 in the

city of Waco, and that said last mentioned property was not so much as mentioned in said bill in respect to any rights or claims of said Mollie E. Dupree thereto; that the prayer of said bill in respect to the said Mollie E. Dupree was that she be enjoined and restrained from surrendering or conveying to any one, certain vendors lien notes alleged in said bill to be held by her in fraud of the rights of said Belknap & Co. and the said bill did not in any way ask any relief in any way whatever as against the said Mollie E. Dupree in reference to the said notes now sued upon and sought to be foreclosed by the cross bill of complainant now filed herein.

These defendants admit that the receivership was made permanent and on the 12th day of December, 1896, a general order was entered in said cause permitting the filing of interventions by persons interested in the property in the hands of the receiver, and referring interventions to the standing master for hearing; they admit that on the 30th day of January, 1897, said Slayden filed his answer to said bill of Belknap & Co. under oath, admitting that he was the owner of four of the notes mentioned in said instrument of December 31, 1894, and that he had accepted the provisions of said instrument of December 3, 1896, averring in his said answer that he did so inasmuch as it gave him additional security for his debt against said Dupree, and praying that his claim be established as a charge on the property in the hands of the receiver in accordance with the terms of said deed of trust.

These defendants further aver that at the time of his acceptance of the security mentioned in said deed of trust of December 3, 1896, for the payment of his debt mentioned therein, said S. W. Slayden agreed to and did release and discharge the lien and mortgage held by him upon said lot 1, block 2, in the city of Waco as security for said debt. And these defendants expressly deny that said S. W. Slayden accepted the security of the deed of trust of December 3, 1896, as additional security for his said debt, but they aver
41 that he accepted the same in lieu of the security held by him against said lot 1, block 2, in the city of Waco. These defendants further aver that afterwards, on to-wit the 24th day of December, A. D. 1897, the said S. W. Slayden executed and delivered to the said W. E. Dupree a formal written release of the deed of trust dated December 31, 1894, to secure the payment of said notes for $900 each, and that said Slayden acknowledged the said release before a notary public and that the same has been duly recorded in the real estate mortgage records of McLennan County, Texas. Whereby these defendants say that said lien retained in said deed from said O. Bailey to said W. E. Dupree conveying said property, reserved to secure said five notes for $900 each and the deed of trust of date December 31, 1894, subsequently taken to further secure said notes, has been fully discharged.

5. These defendants admit that the allegations set forth in paragraph five of said cross bill are substantially true.

6. These defendants admit that the allegations set forth in paragraph six of said cross bill are substantially true.

7. These defendants admit that the said W. E. Dupree and the said Mollie E. Dupree, defendants herein, were original parties to

the said bill exhibited by Belknap & Co., and that the said W. E. Dupree was an original party in the bill exhibited by the said Mansur & Tebbetts Implement Company as aforesaid; they further admit that said Mollie E. Dupree and W. E. Dupree filed, by way of answer, a general demurrer and a general denial to said bill of W. B. Belknap & Co., and that the said W. E. Dupree denied under oath, that he was a partner in the Rosebud Furniture Company, further than which, they made no answer to said bill. And these defendants aver that on a final hearing of said consolidated cause, it was adjudged and decreed by the Court that the said Belknap & Co. take nothing by their said bill, and that the said Mollie E. Dupree was adjudged to go hence without day and recover her costs; so that no matter was established by said decree in any wise prejudicial to the interest or rights of said Mollie E. Dupree upon any issue or pleading in said cause, to which she was a party, or in respect to which any relief was sought against her. These defendants admit that on the 3rd day of December, 1896, said W. E. Dupree had conveyed said lot 1, in block 2 of Waco, to the defendant Mollie E. Dupree, by voluntary deed, without valuable consideration; they aver that said deed was made and executed on the 2nd day of December, 1896, and prior to the execution of said deed of trust of December
42 3rd, 1896. They further aver that by said deed the said W. E. Dupree conveyed to the said Mollie E. Dupree that portion of said lot 1, block 2, which fronts 50 feet on Bridge street and runs back along First street 125 feet, but that said deed did not and does not include 40 by 50 feet of said lot on the alley and First street. These defendants further aver that the property so conveyed by W. E. Dupree to Mollie E. Dupree was at the time, and had been for many years prior to the conveyance of the same as aforesaid, the business homestead of these defendants, and that the same had been occupied by them as a business homestead ever since said conveyance, and is still so occupied by them. These defendants aver that the said W. E. Dupree is a married man and the head of a family and was such many years prior to the execution of said conveyance, and that he carried on his business in said property up to the time of the execution of said deed of trust on the 3rd day of December, 1896, and that he still does business in said property, and is still using the same as a business homestead.

8. These defendants admit that the allegations set out in paragraph 8 of said cross bill are true, but they aver that no lien existed to secure the debt of said Slayden at that time, and that the report of the master was void and of no effect as against either of these defendants for the reason that there was no pleading or issue in the cause, whereby the rights of said Mollie E. Dupree in respect to said property were brought into question.

9. These defendants admit that the allegations set forth in paragraph 9 of said cross bill are substantially true, but they aver that the said judgment and decree of the Court was in no way binding upon the said Mollie E. Dupree or either of these defendants, because no lien existed against said property, and because no pleading or issue was filed or made in said cause to which the said Mollie Dupree, or either of these defendants was a party, whereby the rights or interest

of said Mollie E. Dupree in or to the said lot 1 in block 2 of the city of Waco was sought to be effected or otherwise adjudicated. These defendants aver that said Mollie E. Dupree and W. E. Dupree did file an intervention in said cause, but they aver the same related alone to certain notes which were held by said Mollie E. Dupree and constituted a lien and mortgage upon certain real estate conveyed by said W. E. Dupree in his said deed of trust of December 3, 1896, said deed of trust as to said property, conveying the same subject to the payment of said notes, and said Mollie E. Dupree sought by her intervention to establish her claim against said prop-
43 erty; but these defendants aver that long before the final adjudication of said cause, the said intervention was dismissed by the master, without prejudice, and that no issue whatever was made therein, in respect to the title or interest of said Mollie E. Dupree in or to said lot 1 in block 2 of the city of Waco.

10. These defendants admit that the allegations contained in paragraph 10 of said cross bill are substantially true, except in this: They have no information as to whether J. C. Duke purchased said notes as trustee for Mansur & Tebbetts Improvement Company, Washburn Moen Manufacturing Company and Southern Rock Island Plow Company, or not; nor have they any information as to whether or not plaintiff is the successor of said Duke as such trustee; nor have they any knowledge in respect to how, or for whose benefit, plaintiff claims to hold said notes and the pretended lien to secure the same. These defendants specially deny that there is any lien on Lot 1, in Block 2, City of Waco, to secure the payment of said notes.

11. These defendants admit that the averments set out in paragraph 11 of said cross bill are true.

12. These defendants say that it is true that they claim that the said notes have been fully paid off and the lien on said lot of land fully discharged and that no indebtedness or lien exists in favor of plaintiff in said cross bill or any other person by occasion of the execution of said notes and the lien given by said deed of trust of date December 31, 1894, or the vendor's lien retained in said notes or deed.

13. These defendants further aver that heretofore on, to-wit, the 6th day of May, 1898, said J. C. Duke, claiming to be the holder and owner of said notes described and set out in plaintiff's said cross bill, filed suit thereon in the District Court of McLennan County, Texas, 19th Judicial District, and in his said petition in said suit alleged that he was the holder and owner of said notes, and as such exercised the option given therein to declare all of said notes due and matured on account of default in payment of interest as stipulated and on account of default of payment in note for $900, which fell due and matured on the 1st day of January, 1898. That said J. C. Duke made both of these defendants, defendants to said suit in the District Court of McLennan County, Texas, and sought and prayed therein a judgment against defendant, W. E. Dupree, for the amount of said notes, interest and attorney fees, and also a judgment
44 against both of these defendants foreclosing the lien on said Lot 1, in Block 2, in the City of Waco, alleged to have been

given by said W. E. Dupree as security for said notes in accordance with the deed of trust on said lot, of date December 31, 1894. These defendants aver that they answered in said suit and the same continued on the docket of said Court until the 3rd day of March, 1899, when said J. C. Duke voluntarily dismissed said suit and there was no trial on the merits.

These defendants further aver that on, to-wit, the 27th day of March, 1899, after dismissing said suit in the District Court of McLennan County, Texas, as aforesaid, said J. C. Duke exhibited and filed in the United States Circuit Court for the Northern District of Texas, at Waco, against these defendants his original bill in cause No. 178, Equity, of said Court, wherein and whereby he set out in substance and practically in the same language the facts and averments made in the said cross bill of complaints herein, beginning with paragraph two on page two of said cross bill, and ending with paragraph twelve on page ten of said cross bill, the only substantial change used in the language of the second bill in the matters set forth as above stated being in paragraph ten of said cross bill, and in respect to the alleged acquisition and ownership of said notes of plaintiff and the capacity in which the same are held by him. These defendants further aver that in his said original bill said J. C. Duke prayed to have the benefit of the proceedings in said consolidated suit and of the decree rendered therein, and especially said decree of February 26th, 1897, and that said decree be aided and rendered effectual against the defendants herein named and each of them, and that mortgage of date December 31, 1894, be foreclosed and the property sold in satisfaction of the debt evidenced by the said notes and interest coupons paid to S. W. Slayden out of the funds in the registry of the Court, together with interest thereon, said Duke alleging in his said bill that the failure to pay the interest on said notes, or either of them, should at the option of the holder mature the principal thereof, and that such default had been made and the whole amount of said notes become due; and the said Duke in his bill prayed for an order of sale to sell the property described in said mortgage, and for other relief, etc. These defendants aver that said Duke made his said motion in said Court for leave to file said bill, and that these defendants filed their opposition to said motion on the ground:

45 1st. That said bill was in the nature of a bill of review seeking a different kind of relief from that on which the original decree referred to was given.

2nd. Because as a bill of review it was too late, six months having elapsed.

3rd. Because said J. D. Duke, as assignee, had no authority to bring such a suit.

4th. Because all the parties to the decree were not made parties to the bill.

5th. Because of laches on the part of said Duke.

6th. Because the said bill showed no equity and was bad on general demurrer.

The said Court overruled the opposition of the defendants to said motion and granted leave to said J. C. Duke to file said original bill,

which was accordingly done as aforesaid. Thereafter these defendants filed their demurrer to said bill upon the following ground:

1st. That the said plaintiff has not in and by said bill made or stated such a cause as doth or ought to entitle him to any such relief as thereby sought and prayed for, from or against these defendants.

2. That it appears by the said bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto. And in particular it appears that Mansur & Tebbetts Implement Company, Washburn Moen Manufacturing Company, and W. B. Belknap & Co. were complainants in the decree which plaintiff by said bill seeks to reform and correct, and that S. W. Slayden was the holder of the vendors' lien notes and the intervener in said decree, which plaintiff by said bill seeks so to reform as to subrogate himself to the said Slayden vendor's lien; and that the said Mansur & Tebbetts Implement Company, Washburn Moen Manufacturing Company, W. B. Belknap & Co. and S. W. Slayden are necessary parties to said bill; but neither of them are made parties thereto;

3. That it does not appear from said bill in the intervention of said Slayden, as set out in paragraph six, in said bill, that any
46 issue was made by either of the complainants or any creditor in said consolidated causes by their pleading, setting up a claim of subrogation to such lien, and it does not appear that there was any pleading on which to base the finding of the Master, as set out in paragraph nine of plaintiff's said bill.

4. That it does not appear from plaintiff's said bill that there was any pleading in said consolidated causes by any complainant or creditor therein on which to base the decree in said causes, as set out in paragraph ten of complainant's said bill, and no such relief as by such portion of said decree is granted appears to have been asked or prayed for by any party to said causes.

5. That it does not appear from plaintiff's said bill that by the order of reference to the Master, as set out in paragraph seven of said bill, he was directed or authorized to inquire into or report to the Court rights of complainant or creditors in said consolidated cause to subrogation to the said S. W. Slayden's vendor's lien, nor does it appear from said bill that he was directed to make any investigation or report from which authority to report on said subrogation as set out in paragraph nine of said bill could be inferred.

6. That it does not appear from said bill that either of these defendants had notice of any issue made in the intervention of S. W. Slayden in said causes of the rights of creditors to be subrogated to said vendor's lien.

7. That it appears from said bill, in paragraph eight thereof, that on December 3rd, 1896, W. E. Dupree had conveyed to Mollie E. Dupree said Lot 1, Block 2, of Waco, and that all the proceedings set out in the bill occurred subsequent thereto, and it does not appear from said bill that by any pleadings to which said M. E. Dupree was a party, any relief was sought having for its right the subrogation of the complainants or creditors in said causes to the vendor's lien or trust deed set out in paragraphs six, nine and ten of plaintiff's said

bill, nor does it appear from said bill that there was any adjudication by the decree in said causes in respect to said M. E. Dupree's right or interest in said Lot 1, Block 2, of Waco.

8. That said bill seeks a reformation of the original decree in said consolidated causes and shows no excuse whatever why the relief now sought was not asked or obtained in the original causes and decree.

47 9. That said bill shows no reason why a specific decree of subrogation and foreclosure in favor of said complainants and creditors was not rendered in the original decree, although it appears from paragraph two of said bill that by the act of said W. E. Dupree in giving the trust deed set out therein and the act of Slayden in accepting the same as set out in paragraph six of said cross bill, said vendor lien notes were matured and said Slayden entitled to full payment thereof out of said property conveyed in said deed of trust.

10. That said bill seeks a reformation of the original decree in said causes, which can only be done by appeal or bill of review.

11. The plaintiff is barred of laches and has no right according to his own showing to maintain this bill for the reforming of said original decree, because it appears from said bill that more than six months have elapsed since said original decree was passed.

12. That it does not appear from said bill, as set out in paragraph four thereof, what the "other securities" held by S. W. Slayden consisted of, and which by the prayer in said consolidated cause was sought to be marshalled in order to preserve the rights of complainant and other creditors mentioned in said bill of W. B. Belknap & Co.

13. That it appears from the plaintiff said bill that all the parties thereto, plaintiff and defendant, are citizens of the same State, to-wit, the State of Texas, and therefore this Court has no jurisdiction to hear and determine this cause.

14. That it appears from paragraph eleven of said bill that plaintiff herein is merely the assignee of the notes described in paragraph ten of said bill, and as such cannot bring said bill to reform and correct the original decree in said consolidated causes under and by virtue he claims to have purchased said notes.

15. That by the constant rules of this Court no supplemental bill of Review, or in the nature thereof, ought to be admitted to alter or change matter decreed, but only for error in law appearing in the body of the decree as it is drawn up and enrolled, or for a new matter arising since the decree, or such matter of which the plaintiff in such bill could not have notice at the time of the decree; but the matters assigned by the said supplemental bill for cause of reforma-

48 tion and modification are neither in error in law appearing upon the body of said decree, nor any such matter as aforesaid, but a misjudgment in matter of form only, and not in point of right.

These defendants further aver that thereafter, on, to-wit, the 15th day of October, 1900, said J. C. Duke and these defendants joined issue on said demurrer and the same was heard by the said Court and the Court entered its judgment and decree on said demurrer and thereby in all things sustained the same and made an order and

decree in said cause directing the dismissal of the said bill of the said J. C. Duke with costs to defendants. That thereafter, on the 26th day of October, 1900, upon application of complainant, J. C. Duke, the said order dismissing said bill was so modified by the Court as to be without prejudice of complainant's right to further prosecute his cause of action against defendants, if any he had, attempted to be set up in said bill, and complainant was granted leave to file supplemental bill in said cause on or before the Rule day of December, 1900. The defendants further aver that the said J. C. Duke never filed any further bill or amendment to his original bill in said cause, but elected to stand upon the original bill, and therefore appealed from said Judge of said Court and carries said cause by appeal to the United States Circuit Court of Appeals at New Orleans, and that afterwards the said cause came on again to be heard in said United States Circuit Court of Appeals, when and where the judgment of the lower Court was sustained and all things affirmed.

These defendants aver that the said demurrer was sustained for want of merit and equity in said bill so filed by said J. C. Duke, and not for want of form or proper parties or because the Court had no jurisdiction of the cause. Wherefore these defendants answer and say that the matters and things alleged in the plaintiff's said cross bill have been fully litigated and determined adversely to complainant and his privies, and that they were so litigated and determined before the alleged transfer of said notes by J. C. Duke to plaintiff, and that plaintiff is estopped by reason of the said former decree from further prosecuting this cause.

14. Further answering herein, the defendants aver that the cause of action set up and declared by plaintiff in said cross bill is barred by the statute of limitation of four years, for that all of the notes sued on and described in said cross bill matured and became due more than four years before the filing of said cross bill. And in this connection these defendants aver that J. C. Duke, who then
49 claimed to be the holder of said notes when he filed suit on same in the District Court of McLennan County, Texas, on the 6th day of May, 1898, as hereinbefore alleged, averred that he declared all of said notes then due and matured in accordance with the terms of same and of the said deed of trust on account of default of payment of interest coupons. These defendants further aver that in said bill filed by J. C. Duke against these defendants in the United States Circuit Court for the Northern District of Texas, at Waco, on March 27th, 1899, as aforesaid, said Duke again declared said notes due and matured for failure to pay interest on the same. And sought a foreclosure of said deed of trust and vendor's lien as aforesaid. These defendants further aver that said notes are all dated December 31, 1894, and fall due, respectively, January 1st, 1898, January 1st, 1899, and January 1st, 1900, although they are described in said deed of trust as being due three, four and five years after date, and said deed of trust further provides that if any one of the annexed interest coupons given for interest on said notes remain unpaid for five days after maturity thereof, then at the option of the said O. Bailey, or the holders of the said promissory notes, the whole principal, with

interest then accrued, shall at once become due and payable, and the holder may proceed to collect the same by sale under said deed of trust or otherwise, as such holder may elect.

These defendants further aver that they have denied and repudiated the claims now asserted by plaintiff in his said cross bill ever since said notes were purchased by said J. C. Duke from said Receiver, as alleged in plaintiff's said cross bill, and that notice thereof was brought home to the said Duke shortly after he became the purchaser of said notes, and that said Duke and plaintiff, by their laches and neglect to earlier prosecute this suit, have barred themselves from the right to recover or enforce said notes or said lien against these defendants and against said property, and these defendants here now plead the statute of limitation of four years and laches on the part of the plaintiff and his privies in defense to the said cross bill of plaintiff.

These defendants further aver that on, to-wit, the 25th day of May, 1896, said W. E. Dupree sold and conveyed to J. C. Birkhead, for the consideration of $8,000 in notes, that portion of Lot 1, Block 2, which fronts forty feet on First Street and runs back fifty feet to the alley, beginning twenty feet N. 45 W. from the S. E. corner of said lot and running back forty feet to alley; thence S. 45 W. fifty feet to the corner; thence S. 45 E. forty feet to the corner; thence N. 45 E. fifty feet to place of beginning. They further aver that J. C. Birkhead was the owner of the above described portion of said lot at the time the said bills of complaint were filed by said Mansur & Tebbetts, and Washburn Moen Manufacturing Company, and continued to be the owner of said property until the 8th day of May, 1902, when he conveyed the same to defendant, Mollie E. Dupree, who is now the owner of said property.

And, having thus made full answer to the said cross bill, these defendants pray to be dismissed hence with their costs.

W. E. DUPREE.
MOLLIE E. DUPREE.
By W. M. SLEEPER & BEN KENDALL,
Their Solicitors.

[Indorsed:] No. 274, Equity. W. E. Dupree and M. E. Dupree *vs.* C. W. Mansur and A. S. Keady. Joint and several answers of Cross Defendants. Filed 2nd January, 1905. D. H. Hart, clerk. By L. B. McCulloch, deputy.

Replication of C. W. Mansur to Answer to the Cross Bill.

Filed Feb. 6th, 1905.

In the United States Circuit Court for the Western District of Texas, at Waco.

No. 274. In Equity.

W. E. DUPREE and M. E. DUPREE
vs.
C. W. MANSUR ET AL.

The replication of the above named C. W. Mansur, cross complainant, to the answer of the above named W. E. Dupree and M. E. Dupree, defendants in the cross bill to said cross bill.

This replicant, saving and reserving to himself all and all manner of advantage of exception, which may be had, and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants for replication thereunto, saveth that he does and will ever maintain and prove his said cross bill to be true, certain and sufficient in the law to be answered unto by said cross defendants, and that the answer of said cross defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer to
51 the cross bill contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court may direct, and humbly as in and by his said bill he has already prayed.

J. M. McCORMICK,
Solicitor for C. W. Mansur, Complainant in the Cross Bill.

[Indorsed:] No. 274. In Equity. W. E. Dupree and M. E. Dupree *vs.* C. W. Mansur *et al.*—C. W. Mansur *vs.* W. E. Dupree and M. E. Dupree. Replication of C. W. Mansur to the Answer to the Cross Bill. Filed 6th day of February, 1905. D. H. Hart, clerk. By L. B. McCulloch, deputy.

Agreement as to the Transfer of Notes and as to the Introduction of Evidence.

Filed March 2, 1906.

In the United States Circuit Court for the Western District of Texas, at Waco.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

We agree that S. W. Slayden indorsed without recourse and delivered to F. F. Finks, Receiver, the vendor's lien notes mentioned in the cross bill when his claim was paid out of the registry of the Court on July —, 1897, and that the receiver sold the said vendor's lien notes to J. C. Duke, Trustee, on the — day of August, 1897, who paid the Receiver therefor $300, which went into the registry of the Court; that the sale was confirmed by the Court and the notes delivered by the Receiver to J. C. Duke, Trustee, and that C. W. Mansur is the successor to J. C. Duke in the trust as alleged in the cross bill.

We further agree that either party may introduce any documentary evidence relevant, and may read any part of the transcript of the record in the case of W. E. Evans, Intervener, *vs.* Mansur & Tebbetts Implement Company *et al.*, as printed in the United States Circuit Court of Appeals, Fifth Circuit, numbered 634 in that Court, which record was filed in said last named Court August 27,
52 1897, and the whole of said printed record shall be considered as in evidence, and a copy of said printed record may be filed in this case.

SLEEPER & KENDALL,
Attorneys for Plaintiff.
J. M. McCORMICK,
Attorney for Defendant.

[Indorsed:] No. 274, In Equity. W. E. Dupree *et al. vs.* C. W. Mansur. Agreement. Filed March 2, 1906. D. H. Hart, clerk.

Offerings in Evidence.

Filed 2nd Day of March, 1906.

In the Circuit Court of the United States for the Western District of Texas, at Waco.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Upon the final hearing of the above numbered and entitled cause on the 2nd day of March, 1906, the complainant offered in evidence the following:

1. Depositions of W. E. Dupree and W. W. Evans.

2. Deed from O. Bailey to W. E. Dupree dated Dec. 31st, 1904, conveying one-half interest.

3. Deed of Trust from W. E. Dupree to W. W. Lastinger, Trustee, for the cause of O. Bailey, dated Dec. 31st, 1894.

4. Warranty deed from W. E. Dupree to J. C. Birkhead, dated 25th of Nov., 1895, and filed 3rd day of Dec., 1896, conveying 40 x 50 feet, recited consideration of eight promissory notes of $1,000 each.

5. Release from S. W. Slayden to W. E. Dupree, dated Dec. 24th, 1897, releasing vendor's lien and deed of trust to O. Bailey (W. W. Lastinger, Trustee).

53 6. Deed from W. E. Dupree to Mollie E. Dupree, dated Dec. 2, 1896, conveying 50 x 125 feet business homestead, filed Dec. 4, 1896.

7. Deed from J. C. Birkhead to Mrs. Mollie Dupree, dated May 8, 1902, conveying 40 x 50 feet Lot 1, Block 2, Waco, Texas.

8. Original bill of Mansur & Tibetts Implement Co. *vs.* W. E. Dupree *et al.*

9. Original bill of Belknapp & Co. *vs.* Provident National Bank.

10. All of the portions of record in W. W. Evans *vs.* Mansur & Tibbetts Implement Co. suit, which are referred to in the pleadings.

11. Record in Duke *vs.* Dupree in U. S. Circuit Court.

12. Final decision of Court of Appeals in case of J. C. Duke *vs.* W. E. Dupree.

And the defendants, C. W. Mansur *et al.*, offered the following:

1. Notes described in the Cross Bill.

2. Agreement of parties as to Transfer of Notes.

3. Such part of printed record in J. C. Duke *vs.* W. E. Dupree, in case No. 1045, Circuit Court of Appeals, at New Orleans, as may be relevant.

4. Appointment of S. Keady as Sub-Trustee by C. W. Mansur.

5. Petition of Intervention of Mollie and W. E. Dupree in Mansur & Tibetts Implement Co. *et al. vs.* W. E. Depree *et al.*
6. M. C. H. Park's oral testimony.

[Indorsed:] No. 274, Equity. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Offerings in evidence. Filed 2d day of March, 1906. D. H. Hart, clerk. By Scott W. Key, deputy.

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54 *Direct Interrogatories to W. E. Dupree.*

Interrogatories to Witness W. E. Dupree.

Int. 1st. What is your name, age and place of residence?

Int. 2d. Please state whether or not you are a married man and the head of a family; if so, state when you were married and to whom you were married, and how many children you have, if any.

Int. 3rd. Please state how long you have lived in the City of Waco. Please state how long you have resided with your family in the City of Waco, Texas, and state also in what business you were engaged up to and including the 3rd day of December, 1896, and also state at what place in the City of Waco you carried on your business up to and including the above mentioned date.

Int. 4th. Please state whether or not you ever purchased and became the owner of Lot 1, in Block No. 2, in the City of Waco, Texas, and, if so, when did you purchase said land, and from whom did you purchase the said land, and for what purpose, if any, did you use said land and property from the time you purchased same until you conveyed said land to Mrs. Mollie E. Dupree.

Int. 5th. Please state what business, if any, you carried on in said property known as Lot No. 1, in Block No. 2, in the city of Waco, subsequent to the 3rd day of December, 1896.

Int. 6th. Are you acquainted with S. W. Slayden? If so, please state how long you have known him, and where he resided on or about the 3rd day of December, 1896.

Int. 7th. Please state whether or not you were indebted to S. W. Slayden on or about the 3rd day of Dec., 1896, and, if so, state fully what agreement or contract you made with Slayden on or about said date in respect to said indebtedness.

Int. 8th. Please st[illegible] what, if any, security said S. W. Slayden had for the payment [illegible]aid debt on or prior to the 3rd day of Dec., 1896, and state what agreement, if any, was made between you and said Slayden in respect to said security on or about the 3rd day of Dec., 1896.

55 Int. 9th. What agreement, if any, did S. W. Slayden make with you on or about the 3rd day of Dec., 1896, in regard to executing a release of the security held by him on or prior to said date and substitution of other security for such indebtedness.

Int. 10. If you have said that Slayden agreed to execute a release of the former security held by him for such indebtedness, then state what security he received in lieu of or exchange for the former security held by him for said indebtedness.

Int. 11. Please state whether or not the said Slayden ever executed and acknowledged a release of the former security held by him for said indebtedness, and state what was done looking towards the execution of such release by Slayden, and if no release was actually executed, please state, if you know, the reasons why the said Slayden did not execute the release for said indebtedness, which was prepared on or about the 3rd day of December, 1896.

SLEEPER & KENDALL,
Attorneys for W. E. and M. E. Dupree.

Direct Interrogatories to W. W. Evans.

Interrogatories to Wm. W. Evans.

Int. 1. What is your name, residence and occupation, and if you are a lawyer, please state how long you have practiced law at Waco, Texas.

Int. 2. Are you acquainted with W. E. Dupree and S. W. Slayden; if so, how long have you known them?

Int. 3. Was S. W. Slayden ever a resident of Waco, Texas; if so, about how long and when did he reside in Waco?

Int. 4. Was said S. W. Slayden a resident of Waco on or about the 3rd day of December, 1896?

Int. 5. What business relation, if any, did you have with W. E. Dupree on or about the 3rd day of December, 1896? Did you on or about said date prepare a document for said W. E. Dupree in respect to his business; if so, please state the nature of said document.

Int. 6. Please state whether or not the said W. E. Dupree was indebted to the said S. W. Slayden on or about the 3rd day
56 of December, 1896; if so, please state the nature of said indebtedness and what security, if any, the said Slayden held therefor.

Int. 7. Please state whether or not on or about the 3rd day of December, 1896, you had any conversation with the said S. W. Slayden in respect to the substitu-ion of other security for the security held by him up to that time for the indebtedness of W. E. Dupree to him; if so, please state the substance of said conversation and what, if any, agreement the said S. W. Slayden made with the said W. E. Dupre- in respect to the substitution of new security for the former security held by him.

Int. 8. Please state what document, if any, was drawn by you to be signed by said Slayden in order to carry out and effect said agreement on or about the 3rd day of December, 1896.

Int. 9. Please state the document drawn by you, if you have said one was drawn, was actually signed and acknowledged by said Slayden, and if not, why was the same not signed and acknowledged, if you know.

SLEEPER & KENDALL,
Attorneys for W. E. and M. E. Dupree.

Cross Interrogatories to W. E. Dupree.

Suit Pending in Honorable United States Circuit Court for the Western District of Texas.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Notice: Time and service of copy of interrogatories is hereby waived. Let commission issue to take the answers of the witnesses on the original direct and cross interrogatories.

J. M. McCORMICK,
Solicitor for C. W. Mansur, Defendant.

Suit Pending in the United States Circuit Court for the Western District of Texas, at Waco.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Cross Interrogatories Propounded by Defendant, C. W. Mansur to W. E. Dupree, a Witness for the Plaintiffs.

57 1. Are you the same W. E. Dupree who executed a trust deed on a certain stock of merchandise, and other property, to Burkhead, Trustee, to secure W. W. Evans and other creditors, on or about the 3rd day of December, 1896?

2. When did you purchase lot No. 1, in Block No. 2, in the City of Waco? What was the character of the improvements thereon when you purchased it?

3. When did you sell lot No. 1, in Block No. 2, in the City of Waco, and to whom did you sell it, and for what consideration?

4. When was it, with relation to the time you made the alleged contract or agreement with S. W. Slayden about which you have testified in answer to the seventh direct interrogatory, that you conveyed said Lot No. 1, in Block No. 2, to Mollie Dupree?

5. If, in answer to the 7th direct interrogatory, you have testified that you had a contract or agreement with Slayden in respect to the said Slayden waiving his lien or liens on Lot No. 1, in Block No. 2, in the City of Waco, please state if such contract or agreement was in writing, and if so, whether you have said writing in your possession, and if you have this writing in your possession, attach the same, or a true copy thereof, to your answer hereto. If you have not this writing in your possession, please state who has the

same, if you know, or who had the same when you last saw it, and by whom this writing was signed, the date thereof, and whether said writing was signed by any witness, and if so, whom, giving also their residence?

6. Where is S. D. Slayden at this time? Is he living or dead? If living, what was his address the last time you heard from him? When did you last hear from him? Is the said Slayden solvent or insolvent, and if you say he is solvent, state how you know this fact?

7. Please state fully by whom the premises on Lot No. 1, Block No. 2, in the City of Waco, have been occupied since December 3, 1896. Give the name of each person occupying the same, describe the building, the number of rooms in it, and give the occupants of each room of the building during this period, stating the length of time such rooms were so occupied, and the business in which the person or persons occupying the same were then engaged.

58 8. Please state, if you know, what rents have been paid by the several occupants of the building on Lot No. 1, Block No. 2, in the City of Waco, giving the time covered by the payments of rent by each of said tenants. Please state which other property, of any kind or character, you conveyed, transferred or delivered to Mollie E. Dupree on or about the 3rd day of December, 1896, and the consideration, if any, for such conveyances, transfers or deliveries of property.

J. M. McCORMICK,
Solicitor for C. W. Mansur, Defendant.

Cross Interrogatories to W. W. Evans.

Cross Interrogatories Propounded by Defendant, C. W. Mansur, to William W. Evans.

1. Please state and describe the different legal papers that you prepared on or about the 3rd day of December, 1896, for W. E. Dupree, the names of the creditors or beneficiaries therein, respectively, as far as you remember, and state which of said papers were executed, and by whom executed, and which were not executed.

2. When did you last see S. W. Slayden?

3. When did you last hear of the whereabouts of S. W. Slayden, and where did you then hear he was? Is said Slayden dead or alive, and if alive, what is his present place of residence?

4. Did S. W. Slayden, to your knowledge, ever sign any instrument of writing releasing any lien on Lot No. 1, Block No. 2, in the City of Waco? If so, give the date of such instrument, the date when it was executed, attach the original or a true copy thereof to your answer hereto, marked for identification, if you have it, and if said instrument is not in your possession, describe it as fully as you can, and state in whose possession it was the last time you saw it.

5. Why was it that W. E. Dupree desired a release from S. W. Slayden on the 3rd day of December, 1896? What reason did you

give to Slayden for requesting him to release his lien or liens on Lot No. 1, in Block No. 2? At whose request did you go to see Slayden in respect to this matter, and if you say that you went at the request of W. E. Dupree and M. E. Dupree, state what
59 instructions you had from them relative to the proposed transaction with Slayden?

6. If you have stated that amongst the documents which you prepared on or about the 3rd day of December, 1896, was one for Slayden to sign releasing the lien or liens on the lot above mentioned? Please state whether such instrument was ever signed my Slayden, to your knowledge, where such instrument was when you last saw it, and if you have it in your possession, attach the original or a true copy thereof to your answer hereto, and state when it was that Slayden declined to execute this instrument.

7. Were you present when Slayden accepted the deed of trust on merchandise and other property executed by said Dupree to said Slayden, yourself and others of his creditors on or about December 3, 1896? If so, please state everything that passed at that time between Slayden and Dupree or Slayden and yourself representing Dupree. Give the name of every person present when this acceptance was made. Was this acceptance in writing? If so, who wrote out the acceptance, who signed the same, and at whose request was it written, and where was such writing when you last saw it? Give the terms of said writing in full, as you now recollect them?

8. Is it not a fact that you presented the release you had drawn up to Slayden for his signature prior to his acceptance of the trust deed made to him, yourself and other creditors, and that Slayden refused to sign it?

9. Is it not a fact that subsequent to his acceptance of the trust deed made by Dupree to Slayden, yourself and other creditors on or about December 3, 1896, you presented to said Slayden a release of his lien on Lot No. 1, in Block No. 2, for his signature, and that he refused to sign it?

J. M. McCORMICK,
Solicitor for C. W. Mansur, Defendant.

[Indorsed:] No. 274, Equity. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Direct and Cross Interrogatories to W. E. Dupree and William W. Evans. Filed 1st day of April, 1905. D. H. Hart, clerk. By L. B. McCulloch, deputy.

60 Suit Pending in the Honorable United States Circuit Court for the Western District of Texas.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Answers and depositions of W. E. Dupree and William W. Evans, both residing in McLennan County, Texas, to the accompanying direct and cross interrogatories propounded to them, respectively, in the above numbered and entitled cause, taken before J. W. Cocke, Notary Public, McLennan County Texas, in accordance with the accompanying commission.

Answers of Witness W. E. Dupree.

Answer to Int. First:

My name is W. E. Dupree, age 49 years, and place of residence, Waco, Texas.

Answer to Int. Second:

I am a married man and head of a family; was married to Miss Mollie E. Cash, Waco, Texas, February the 9th, 1881. We have two children—a daughter, Miss May Vaughan Dupree, and a son, W E. Dupree, Jr.

Answer to Int. Third:

I have lived in Waco, Texas, since December, 1879. Have resided with my family in Waco, Texas, ever since my marriage, February 9th, 1881, up to the present time. I was engaged in the brokerage and commission business here from 1880 up until 1884; I then engaged in the wholesale produce business, and continued in same until about 1892, when I then engaged in the agricultural implement and vehicle business. I continued in the last named business up to and including December 3, 1896. My place of business from 1880 to about 1883 was up stairs, corner of Fifth and Austin Streets, and from 1883 to 1884 at 207 or 209 South Front Street, then from 1884 to 1887 my place of business was 309 and 311 Franklin Street. The latter part of 1887, I removed to 101-103 Bridge Street, corner First, which was on Lot 1, Block 2, in the City of Waco, and continued in business there up to and including December 3, 1896.

61 Answer to Int. Fourth:

I purchased and became a half-owner, in an undivided one-half interest, with O. Bailey, Lot 1, in Block 2, in the City of Waco, on or about November 18th, 1887. The above property was purchased from M. C. H. Park, trustee, and on or about December 31st, 1894, I purchased from O. Bailey his one-half undivided interest in Lot 1, Block 2. I used and occupied the front part of Lot 1 in Block 2, 50 x 125 feet, which is now covered by a two-story brick building with a cellar, for mercantile purposes and as my business

homestead, from the time I moved into it in 1887, up to and including December 3rd, 1896.

Answer to Int. Fifth:

On December 4th, 1896, I filed a deed of trust, conveying to J. C. Birkhead, trustee, for the benefit of my creditors, all of my stock of merchandise of any and all kind whatsoever, which was stored in my business homestead, located on Lot 1, in Block 2, City of Waco, and also other points, and on or about December 6th, 1896, the United States Court appointed F. F. Finks receiver, and he immediately took charge of the stock of goods stored in my business homestead located in Lot 1, Block 2, and I was ordered by him to keep out of the building, which I did, and he continued with the goods in the building until the latter part of January, 1897, when at my request and urgent solicitation he removed the stock of goods from the above described building, and I immediately entered the same as soon as the receiver vacated, and put in a stock of agricultural implements, vehicles, etc., which I was selling mostly on commission for manufacturers, and continued in this business occupying the entire house until January, 1898. At that time I sold part of the stock of goods I was carrying to the Dupree Commission Company, and some the lines I had I continued to carry for sale in the above described premises for my own account until December, 1900, when I filed a voluntary petition in bankruptcy, and since that date and up to the present time, I have continued my business in said business homestead, located at 101-103 Bridge street, in Lot 1, Block 2, City of Waco, and have rented the building by the month to Dupree Commission Company, reserving the right to carry on the storage business therein, which I am still engaged in.

Answer to Int. Sixth:

I am acquainted with S. W. Slayden; I have known him since 1881 or 1882. At that time he resided in Waco, Texas, and
62 continued to reside in Waco, Texas, up to and including December 3, 1896.

Answer to Int. Seventh:

Yes, I was indebted to S. W. Slayden on December 3, 1896. At that time he was holding my notes for purchase money executed to O. Bailey on December 31, 1894, for the purchase on an undivided one-half interest in Lot 1, Block 2. I proposed to him on December 3, 1896, that if he would release the vendor lien on whatever notes he had, I would secure him a deed of trust on other property on which the value was ample, and pay off all the said notes, some which were not due in several years, at once, as I had a contract with him that I could take these notes up any time I desired to do so. Mr. Slayden said he would accept the proposition.

Answer to Int. Eighth:

S. W. Slayden had vendor's lien notes for purchase money on which lien was retained on one-half undivided interest in Lot 1, in Block 2, in the City of Waco, conveyed to me by O. Bailey on December 31, 1894. On December 3, 1896, Mr. Slayden agreed with me to release the vendor's lien in said notes and to accept the security in lieu thereof in a deed of trust, which I was preparing

to file, and he was to be in Class A, and same was filed on morning of December 4th, 1896.

Answer to Int. Ninth:

S. W. Slayden agreed with me on December 3, 1896, to execute a release, releasing the vendor's lien in notes he had on Lot 1, in Block 2, in the City of Waco, and to accept a deed of trust which was being prepared on that day in lieu of vendor's lien notes which he then held, to secure him.

Answer to Int. Tenth:

S. W. Slayden received security in a deed of trust which was prepared on December 3, 1896, on goods, wares, merchandise and real estate of the value of about $150,000.00, and he was placed in Class A, on which the total indebtedness in said class was about Thirty-eight Thousand Dollars ($38,000.00), the terms of the deed of trust being that Class A was to be paid in full.

Answer to Int. Eleventh:

Late on the afternoon of December 3, 1896, S. W. Slayden accompanied by to my attorney's office, Prendergast & Evans, in the Provident Building, where a deed of trust had been prepared on that date, and he was shown by W. W. Evans, one of my attorneys,
63 that he was placed in Class A in said deed of trust, which I had already signed and acknowledged. Mr. Slayden thereupon accepted the deed of trust and told William W. Evans to prepare a release, releasing the vendor's lien notes, and he would sign and acknowledge same; that thereupon William W. Evans prepared the release, releasing the vendor's lien notes which Mr. Slayden then held on Lot 1, in Block 2. The release was then handed to Mr. Slayden for him to sign, and to the best of my recollection he signed same right there. Judge Evans told him that he was not a notary public and at that time there was none in the office, which was then getting dark. Mr. Slayden and myself went to the several offices in the Provident Building where there were notaries and we were unable to find one, as it was getting dark and the offices had closed for business that day. We then returned to the office where Judge Evans was waiting, and Mr. Slayden stated to Judge Evans that we were unable to find a notary, whereupon Judge Evans told him that he could have the same properly acknowledged next morning, and bring it to the office, which Mr. Slayden said he would do. We then left the office, it being dark, and in the next few days I asked my attorney if Mr. Slayden had brought up the release as agreed, and Judge Evans informed me that he had not. I saw Mr. Slayden in a short time and asked him for the release, and he stated that his attorney, M. C. H. Park, had advised him not to deliver or make any release until he received his money; hence I never received any release until on or about December 26th, 1897, when I received a release from S. W. Slayden, releasing all the vendor's lien notes that were held by him at that time on Lot 1, in Block 2, in the City of Waco, Texas, and said release was recorded in the records of McLennan County, Texas, in Book 28, page 389, on the 29th day of December, 1897.

Suit Pending in the United States Circuit Court for the Western District of Texas.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Answers to Cross Examination.

Answer to Int. First:

Yes, I am the same W. E. Dupree.

64 Answer to Cross Int. Second:

I purchased an undivided half interest in Lot 1, Block ...., from M. C. H. Park, trustee, on or about November 18th, 1887, and the consideration for Lot 1, Block 2, paid by myself and O. Bailey to M. C. H. Park, trustee, was $6,000.00, and on or about December 31, 1894, I purchased from O. Bailey the other half of Lot 1, in Block 2. The improvements on the property at that time were a two-story brick storehouse, with cellar, fronting fifty (50) feet on Bridge street, part of house extending back on First street on said lot about sixty-five (65) feet and part of it about one hundred (100) feet. The back part of Lot 1, in Block 2, on the corner of Alley and First street had a two-story brick residence on same.

Answer to Cross Int. Third:

On or about May 25th, 1896, I sold to J. C. Birkhead 40 x 50 feet off the back end of Lot 1, in Block 2, fronting forty (40) feet on First street, and running back fifty (50) feet on alley between Washington and Bridge streets. On this lot was located the two-story residence referred to in answer to cross interrogatory second. The consideration for this part of Lot 1, in Block 2, was one dollar cash in hand paid and eight vendor's lien notes for one thousand ($1,000.00) dollars each, retaining a lien on said property for purchase money. On or about December 2, 1896, I conveyed to my wife, Mrs. Mollie E. Dupree, 50 x 125 feet, being the balance of Lot 1, in Block 2, same being covered by two-story brick store house with cellar, which was my business homestead and being occupied by me as such at that time. The consideration for this part of Lot 1, in Block 2, was one dollar and love and affection.

Answer to Cross Int. Fourth:

The contract and agreement made with S. W. Slayden about which I have testified in direct interrogatory seventh was made on December 3, 1896. I never conveyed to my wife, Mrs. Mollie E. Dupree, all of Lot 1, in Block 2; I only conveyed to her 50 x 125 feet of said lot, and, as stated in cross interrogatory third, same was conveyed to her on or about December 2, 1896.

Answer to Cross Int. Fifth:

As explained in direct interrogatory eleventh, I made a contract and agreement with S. W. Slayden on December 3, 1896, to secure him a deed of trust on other property on that date, and to pay

off vendors' lien notes he was holding on Lot 1, in Block 2, in the City of Waco, and on December 3, 1896, one of my at-
65 torneys, William W. Evans, prepared a release after S. W. Slayden had accepted the deed of trust executed that date for S. W. Slayden to sign releasing the vendor's lien which he had held on Lot 1, in Block 2, in the City of Waco, and to the best of my recollection, he signed the release in the presence of Judge Evans; there was no notary in the office at that time of day, which was late, and most of the offices were closed, it being after 6 o'clock. I went with Mr. Slayden to several offices where there were notaries, but were unable to find any notaries in their offices, and returned to the office of Prendergast & Evans with Mr. Slayden. Mr. Slayden stated to Judge Evans, one of my attorneys at that time, that we were unable to find a notary that night. Thereupon, Mr. Evans told Mr. Slayden that he could go before some notary next morning and acknowledge the release and bring it up to him, which Mr. Slayden agreed to do. This release was dated December 3, 1896. Mr. Slayden took the release away with him and that was the last time I ever saw that release, the one Judge Evans prepared on December 3, 1896, and to the best of my recollection, there were no witness- that signed the release as it was to be acknowledged before a notary. As I testified in direct interrogatory eleventh, Mr. Slayden executed a release, releasing the vendors lien notes which he held on Lot 1, Block 2, in the City of Waco, and delivered same to me the latter part of December, 1897 which was duly recorded. This release I now hold, but the one prepared on December 3, 1896, according to Mr. Slayden's instruction and agreement was not delivered to me or to my attorneys.

Answer to Cross Int. Sixth:

Of my own knowledge I do not know where S. W. Slayden is at the present time. I have not heard of his death, so presume he is still living. I do not find that I have received any letter or communication from S. W. Slayden since he left here and do not think I have heard from him since he left here. I have heard that he was living in New York City. I do not know S. W. Slayden's financial condition at this time and I am unable to say what it is.

Answer to Cross Int. Seventh:

The business homestead, 50 x 125, located on Lot 1, Block 2, in the City of Waco, was occupied by J. C. Birkhead, as Trustee, from December the 4th, 1896, until about December 6th, or 7th, 1896, and on or about December 6, or 7, 1896, F. F. Finks, appointed receiver by the United States Court, entered the building above described and took charge of the stock of goods in same and
66 occupied the entire building ordering me out of it, until on or about January 19, 1897, when he vacated the building at my urgent request. As soon as I could get possession of the business homestead, which was on or about 20th, day of January, 1897, I immediately moved into same, put in a stock of goods, agricultural implements, vehicles, etc., and continued to occupy the entire building solely and alone until January 1898, when I rented certain parts of the building to the Dupree Commission Company by the month

at a monthly rental granting them the privilege to do business in the house with an agreement that they would surrender the part of the house they occupied any time demanded of them, and they have continued using a part of the building located on Lot 1, in Block 2, in the City of Waco, since January, 1898; I have continued my office in the building and retained a part of it on each floor and the cellar for my own use in carrying on my individual business ever since it was turned over to me by the receiver, on or about January 20th, 1897, and I am occupying it at the present time. The building is 50 x 125 feet, located on the corner of Bridge and First streets, on Lot 1, in Block 2, in the City of Waco, is a two-story brick building, with cellar. The cellar is all in one room; the first floor is one large room; the second story has a large storage room, two small rooms in connection with the storage room, and two front offices with dressing room and lavatory attached. The cellar floor to the building, part of it has been used by the Dupree Commission Company since January, 1898, and part of it I retained for my own use; the first floor, the front office by the door, has been occupied by the Dupree Commission Company, and also part of the floor space—I have retained the other part of the first floor for my own use; the second or last floor, part of the storage room has been occupied by the Dupree Commission Company, and they were also allowed to keep a safe, desk, typewriter, letter cabinet, and papers in the front office, the balance of the second floor as described herein, I have retained kept and occupied myself for the purpose of carrying on my individual business. The Dupree Commission Company are and have been engaged since January 1898, in the agricultural, implement, wholesale grain and flour business. My business was from January 1st, 1898, to December, 1900, the commission and sewing machine business, and on or about December 30th, 1900, I filed a voluntary petition in bankruptcy. Since that time I have kept my regular office in the business homestead, located in Lot 1, in Block 2, in the City of Waco, and have carried on a storage business in the space I have retained in the business homestead. I have also

67 received a salary for acting as President of the Dupree Commission Company since January, 1898. As I testified in cross interrogatory third, I sold to J. C. Birkhead on May the 26th, 1896, 40 x 50 feet off the back end of Lot 1, in Block 2, in the City of Waco, on which there was a two story brick residence, the same containing nine rooms and being thirty by fifty feet in size, and on December 3, 1896, this property was owned by Mr. Birkhead and continued to be owned by him and in his possession until about the 1st of October, 1902, when my wife, Mrs. Mollie E. Dupree, was placed in possession of the above described property, she having purchased same with her separate funds, as shown by deed dated May 8th, 1902, recorded in Volume 160, page 22, of the records of McLennan County, Texas. During the time that the property was owned by J. C. Birkhead, I do not know the number of the tenants he had, nor the names of all of them or the time of his different tenants occupancy, and as he had a great many different tenants during the time he owned the property. From about Octo-

ber 1st, 1902, until the lat-er part of July, 1903, the building described above which is on the back end of Lot 1, Block 2, in the City of Waco, and known as No. 110 North First Street was occupied by Celia Holder, colored as a colored boarding house and family residence. This house was vacated by Celia Holder the latter part of July, 1903, and on or about August the 10th, 1903, the same property was rented to Julia Watson, colored, who used same as a colored boarding house and family residence, and she has occupied same up to and including the present time.

Answer to Cross Int. Eighth:

Yes, I know the rents that have been paid for the business homestead located on Lot 1, Block 2, in the City of Waco, since December 3, 1896. During the time occupied by J. C. Birkhead as trustee, no rent was paid; for the time occupied by F. F. Finks receiver from about December 7th, 1896, to about January 19, 1897, the Court allowed $139.95 rent. I have never paid any rents myself for any time I have occupied the building, as it is my business homestead and has been owned by my wife, Mrs. Mollie E. Dupree, since about December 2, 1896. The Dupree Commission Company has paid a monthly rental of $100.00 for the part of the building they have used in their business since January, 1898. I also know the rents that have been paid for the two story brick residence on the back end of Lot 1, Block 2, in the City of Waco and known as No. 110 North First Street. Since about October 1st, 1902, during the time it was occupied by Celia Holder, from about October 1st, 1902, to the latter part of July, 1903, she paid rent $204.00. Dur-
68 ing the time occupied by Julia Watson, from about August 10, 1903, up to the present time, she has paid rent amounting to $325.25. The house is now rented to Julia Watson at $5.00 per week. I do not know the amount rent collected by J. C. Birkhead, during the time he owned the above described property. I transferred and delivered to my wife, Mrs. Mollie E. Dupree on the 3rd day of December, 1896, $71,000.00 in notes, most of which were farmers' trade notes past due, to pay her a debt of $25,866.55 that I owed her for borrowed money at that time, which she had loaned me out of her separate estate and funds, which I had used in my business. The notes which I transferred to her on December 3, 1896, to pay the above debt, were insufficient to pay same, for she was never able to realize out of same by several thousand dollars what I owed her for borrowed money on December 3, 1896.

W. E. DUPREE.

Answers of Witness, William W. Evans.

Suit Pending in the Honorable United States Circuit Court for Western District of Texas.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

Answer to Int. First:

William W. Evans. I live in Waco, Texas. I am a lawyer, was admitted to the bar in 1881 and held office as County Judge. I have been — active practice since 1888.

Answer to Int. Second:

I am. A number of years.

Answer to Int. Third:

He was. He resided here in the nineties, ten years.

Answer to Int. Fourth:

He was.

Answer to Int. Fifth:

Represented W. E. Dupree as his counsel, I prepared on said date a commercial deed of trust, conveying all his stock of goods, wares and merchandise to certain of his creditors with power
69 vested in the trustee to sell same and pay the debts of the secured creditors.

Answer to Int. Sixth:

He was. He owed Slayden for some notes that were given for purchase money on a lot on Bridge Street, in which Dupree conducted his business.

Answer to Int. Seventh:

Slayden's claim was placed in the deed of trust named above in Class A, to be paid in preference to all creditors and subsequent classes and Mr. Dupree brought Mr. Slayden to my office on the afternoon of the writing of the deed of trust, and both of them were discussing the propriety of Mr. Slayden's releasing his vendor's lien on lot and accepting under the deed of trust, whereupon Mr. Slayden asked me if he would be entirely safe if he released his vendor's lien and accepted under the deed of trust, and I told him he would, thereupon he agreed to do so, and requested me to prepare a release of his vendor's lien, which I did, and he signed it, or agreed to sign it, my recollection being that he did sign, and there being no notary in the office, he and Mr. Dupree went out to secure a notary, that he might acknowledge the release, and I never saw them about the matter again.

Answer to Int. Eighth:

A release of the vendor's lien above referred to.

Answer to Int. Ninth:

My recollection is that the document was signed, but I am not clear on that point, however, Mr. Slayden agreed to sign it and

acknowledge it, and took the release and he and Dupree went out of the office in search for a notary, it being late in the afternoon. I do not know whether he acknowledged it or not, as I never saw the paper again.

WM. W. EVANS.

Suit Pending in Honorable United States Circuit Court for the Western District of Texas.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

70 *Answers to Cross-interrogatories.*

Answer to Cross Int. First:

I prepared the deed of trust above named to be signed and recorded in McLennan County and had my stenographer prepare duplicates of same, two I think, to be recorded in other counties. I, also, prepared the release spoken of. These are all the papers I remember to have prepared on that day. Some of the creditors preferred in the deed of trust in Class A, the Provident National Bank, S. W. Slayden, Sam Sanger, myself and others. I do not remember the creditors preferred in Classes B. and C. The deed of trust and duplicates were executed and the release named before signed, but was not acknowledged in my presence.

Answer to Cross Int. Second:

It has been several years since I saw him.

Answer to Cross Int. Third:

Three or four years ago. Colorado. I do not know whether he is dead or alive, or anything about him now, or where he is.

Answer to Cross Int. Fourth:

As before stated, I prepared a release of the vendor's lien notes held by Slayden on Lot 1, in Block 2, of the original town of the city of Waco, and my recollection is that Mr. Slayden signed it, but I am not certain about it, at all events he said he would sign it and went out with the instrument in company with Mr. Dupree to find a Notary to acknowledge it. I have not the original or a copy of it in my possession and have not seen or had same since it was prepared. I think it was in Mr. Slayden's possession the last time I saw it.

Answer to Cross Int. Fifth:

I did not go to see Slayden, but Dupree had deeded the property to M. E. Dupree for the payment of money he owed her and desired, so he stated, to relieve it of the lien, and therefore placed S. W. Slayden in Class A in the deed of trust with the agreement that Slayden should release the vendor's lien and accept under the deed of trust and Mr. Slayden came to my office, as before stated, and asked me if he would be safe in doing so. I told him he would,

thereupon, he agreed to execute the release and accepted under the deed of trust.

71 Answer to Cross Int. Sixth:

I have answered all this question in my answers to the Fourth and Fifth cross interrogatories. I do not know when Slayden declined to execute it, except from hearsay. I have since heard that after accepting under the deed of trust with the agreement that he should release the vendor's lien, he afterwards went to M. C. M. Park, an attorney of Waco, at present referee in bankruptcy, who advised him not to execute the release.

Answer to Cross Int. Seventh:

I was. Mr. Slayden came into the office with Mr. Dupree, there being no one present except we three, it being in my private office. The deed of trust had been dictated to my stenographer and written off by him on the machine. Why Mr. Slayden came to my office, I do not know, but he asked me at that time if he was safe in accepting under the deed of trust and releasing the vendor's lien and I told him he was, and he said he would release and accept under the trust deed. I thereupon prepared the release in the usual form. He read it and agreed to sign it and acknowledge it and then accepted under the deed of trust, but there being no notary in the office at that hour, he went out with Mr. Dupree to find a notary before whom to acknowledge the release. The acceptance was by parol.

Answer to the Cross Int. Eight:

I did so present the trust deed and Slayden agreed to sign it and then accepted under the trust deed.

Answer to Cross Int. Ninth:

It is not the fact, Slayden agreed to execute the release before he accepted under the trust deed. Slayden never did in my presence or to me refuse to execute the release and sign the same.

WM. W. EVANS.

* * * * * * *

DEED FROM O. BAILEY TO W. E. DUPREE.

Filed Mar. 2, 1906.

STATE OF TEXAS, *County of McLennan:*

Know all men by these presents, that I, O. Bailey of the

72 County of McLennan and State aforesaid, for and in consideration of the sum of forty-five hundred dollars to me in hand paid by W. E. Dupree and five promissory notes of nine hundred dollars each, all of even date with this deed, and maturing one, two and three, four and five years from this date which notes are for purchase money for property herein conveyed and the vendor's lien is hereby reserved on the said property to secure the above described notes. In consideration of the premises have granted, sold and conveyed, and by these presents do sell grant and convey unto the said W. E. Dupree of the County of McLennan and State of Texas, all that certain property known as Lot one (1), Block two (2), in the City of Waco, Texas, according to the plat of said city, this being

the same property conveyed to me and W. E. Dupree by N. W. Battle for himself and as trustee and M. C. H. Park, as trustee, this conveyance being recorded in book 59, pages 535, 536 and 537, of records for deeds in McLennan County, Texas, to which refer-e is hereby made for identity. To have and to hold the above described premises, together with all and singular the right, and appurtenances thereto in anywise belonging unto the said W. E. Dupree, his heirs and assigns forever; and I do hereby bind myself, and my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said W. E. Dupree his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand at Waco, Texas, this 31st day of December, A. D. 1894.

O. BAILEY.

THE STATE OF TEXAS, *County of McLennan:*

Before me, W. H. Lastinger, a Notary Public in and for McLennan County, Texas, on this day personally appeared O. Bailey known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this January 21st, A. D. 1895.

[SEAL.] W. H. LASTINGER.
Notary Public, McLennan Co., Texas.

STATE OF TEXAS, *County of McLennan:*

I, T. H. Brown, Clerk of the County Court of said County,
73 do hereby certify that the above instrument of writing dated on the 31st day of December, A. D. 1895, with its certificate of authentication was filed for record in my office this 21st day of January, A. D. 1895, at 2:20 P. M., and duly recorded the 4th day of February, A. D. 1895, at 3:30 P. M., in the records of said county in Vol. 99, on page 390.

Witness my hand and the seal of the County Court of said County, at office in Waco, the day and year last above written.

[SEAL.] T. H. BROWN.
Clerk County Court, McLennan County, Texas.

(Indorsed as follows:) Warranty Deed with wife's separate acknowledgement. O. Bailey to W. E. Dupree. Filed for record 21 Jan'y, 1895, at 2:30 P. M. T. H. Brown, county clerk, by Speak, deputy.

Filed 2 day of March, 1906. D. H. Hart, clerk, by Scott W. Key, deputy.

DEED OF TRUST FROM W. E. DUPREE TO W. W. LASTINGER.

Filed March 2, 1906.

THE STATE OF TEXAS, *County of McLennan:*

Know all men by these presents, that I, W. E. Dupree of Waco, in the County of McLennan and State of Texas, for and in consideration of the sum of five dollars to me in hand paid by W. W. Lastinger, Trustee, of Waco, Texas, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said W. W. Lastinger, trustee, and to his successors in this trust, and to his and their heirs and assigns forever, all and singular the following described property, viz: An undivided one-half interest in and to lot number one (1) in block two (2) in the City of Waco, State of Texas, as shown by the map of said City of Waco, State of Texas. Said lot 1 in said block 2 fronts fifty feet on Bridge Street and runs back 165 feet to the alley. To have and to hold the herein described premises, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said W. W. Lastinger, trustee, his heirs and assigns forever.

And I do hereby bind myself, my heirs, executors and
74 administrators to warrant and forever defend all and singular the said premises unto the said W. W. Lastinger, trustee, his heirs, and assigns forever against every person whomsoever lawfully claiming or to claim the same or any part thereof.

This conveyance is intended, however, as a trust for the better securing of five certain promissory notes given by the grantor herein and described as follows: Each note is dated December 31, 1894, and due one, two, three, four and five years thereafter respectively with 8% annual interest signed by me and payable to O. Bailey or order (with current rate of exchange on New York) with interest thereon at the rate of 8% per annum until fully paid, said interest payable annually on the first day of January in each and every year according to the terms of interest coupon notes, thereto annexed, with a special agreement in making and delivering of said promissory notes that if any one of said annexed interest coupons remain unpaid for five days after maturity thereof, then at the option of the said O. Bailey or the holder of said promissory notes the whole principal with interest then accrued shall at once become due and payable and the holder may proceed to collect the same by sale under this deed of trust or otherwise as such holder may elect.

And whereas for the better securing of said note with all interest due thereon to the payee or endorsee or other holder thereof, I, the said grantor herein, do hereby covenant with the said O. Bailey as follows: That the herein described property is not my homestead nor claimed, used or enjoyed by me as such and that I have other property which we occupy and claim as such. That I will pay the said principal notes and annual interest as the same becomes due and

payable. That I have a good and perfect title in fee simple to the said lands and have a right to convey the same to the said W. W. Lastinger, trustee; that I will execute such further assurance upon the said lands as may be requisite; that I have done no act to encumber the said lands; and that I will insure the buildings on the said lands to the amount of not less than five thousand dollars, in an insurance company to be selected by the said trustee and I will assign the policy or *politics* thereof unto the holder of said notes with full power to demand, receive and collect all such insurance money and apply the same to the payment of said note and interest due thereon; and that I will pay all taxes or assessments laid upon the said premises or chargeable against said promissory note.

And it is hereby agreed between the two parties hereto that the said O. Bailey or other holder of said note may pay all insurance taxes or rates that may from time to time fall due and be unpaid in respect to the premises herein described and charged such payment with interest at the rate of 10% per annum on said premises; and that in case the said O. Bailey or any holder of said note satisfy any charge on the lands and make any other advances for insurance, taxes or otherwise to or on account of the grantor herein the amount paid in respect therefor shall be payable forthwith, with interest at the rate of 10 per cent. per annum until paid and said O. Bailey or any holder shall be entitled to all the equities of the person to whom such moneys shall have been paid.

75

Now, therefore, if the said promissory note be well and truly paid principal and interest as the same becomes due and payable according to the true tenor and effect thereof and if the said covenants and agreements be faithfully kept and performed then and in that case only, this conveyance of said premises shall become null and void, and the property herein described shall become again wholly mine and these presents shall be released in due form at my costs otherwise to continue in full force and effect.

But in any case of any failure or default on my part to keep or perform any of the covenants or agreements herein contained, I, the said grantor do fully authorize and empower the said W. W. Lastinger, trustee, hereunder, and it is hereby made his special duty at the request of the said O. Bailey or other holder of said note at any time made after default as aforesaid to sell the above described property at private sale or to the highest bidder for cash in hand or on credit at the Court House door in McLennan County, Texas, at public outcry within legal hours after giving public notice of the time, place and terms of said public sale and of the property to be sold by publishing the same in some newspaper published in the City of Waco, McLennan County, Texas, for twenty days prior to sale, said trustee having privilege to sell such property together or in lots or parcels such as to him shall seem expedient and after said sale as aforesaid to make, execute, *the* deliver to the purchaser or purchasers thereof in my name a good and sufficient deed or deeds in law to the property so sold in fee simple and receive the proceeds the same to apply in order as follows:

First. To the payment of the proper expenses of advertising the sale; second, to the payment of said note so in failure or default together with all interest due thereon or any of said coupons and also the taxes and insurance as aforesaid with interest; third, to the payment to the said trustee of ten per cent. upon the whole amount due and unpaid as an attorney's fee for executing the pro-
76 visions of this trust; and lastly, to hold the remainder of the moneys, if any, subject to my order.

And should the said W. W. Lastinger, trustee, fail or refuse or be disqualified from acting hereunder the said O. Bailey or his legal representative shall have full power to appoint a substitute in writing who shall have the same powers which are hereby delegated to the said W. W. Lastinger, trustee, and I, the said grantor, do hereby absolutely ratify and confirm any and all acts that the said trustee may lawfully do in the premises.

And it is further and lastly specially agreed by the parties hereto that in any deed or deeds given by any trustee hereunder any and all statements of fact or other recitals therein made as to the nonpayment of the money secured or as to the time, terms and place of sale and property to be sold having been published, or as to other preliminary act or thing having been duly done by said trustee shall be taken by any and all courts of law and equity as *prima facia* evidence that the said statements or recitals do state facts and without further question to be accepted. Should I fail or neglect to insure said property for the benefit of or the holder of the notes herein described, then the holder of them is hereby empowered to procure said insurance for the protection of said notes and any payment made on account of said insurance becomes a charge upon this property the same as the notes.

Witness my hand this the 31st day of December, A. D. 1894.

W. E. DUPREE.

THE STATE OF TEXAS, *County of McLennan:*

Before me, W. H. Lastinger, a Notary Public in and for said county and state, on this day personally appeared W. E. Dupree, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and official seal this 9th day of January A. D. 1895.

[SEAL.] W. H. LASTINGER,
Notary Public, McLennan County, Texas.

STATE OF TEXAS, *County of McLennan:*

I, T. H. Brown, Clerk of the County Court of McLennan County,
Texas, do hereby certify that the above and foregoing deed of
77 trust and certificate attached thereto was filed in my office for record on the 12th day of Dec. 1895, at 10 o'clock a. m., and was recorded on the McLennan County Mortgage Book 21, page 315-6-7-8-9 on the 12th day of Dec. 1895, at 12:40 p. m.

Given under my hand and seal of said County Court at office in the City of Waco, this the 12th day of Dec. A. D., 1895.

[SEAL.] T. H. BROWN,
Clerk County Court, McLennan County, Texas.
By C. C. LASTINGER, *Deputy.*

(Indor-ed as follows:) No. 274 Eq. McLennan County, Texas. Dated Dec. 31, 1894. Deed of Trust. W. E. Dupree to W. W. Lastinger. Filed for record this 12 day of Dec. A. D. 1895, at 10 o'clock a. m. T. H. Brown, Clerk. By C. C. Lastinger, D. C. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

DEED FROM W. E. DUPREE TO J. C. BIRKHEAD.

Filed March 2, 1906.

STATE OF TEXAS, *County of McLennan:*

Know all men by these presents, that I. W. E. Dupree of the County of McLennan, State of Texas, for and in consideration of one dollar cash to me in hand paid by J. C. Birkhead of the County of McLennan, State of Texas, the receipt of which is hereby acknowledged and the further consideration of eight promissory notes of even date and tenor herewith for the sum of one thousand dollars each, all bearing interest from date at the rate of eight per cent. per annum payable annually and providing for 10% attorney's fee for collection, which said notes are due and payable at Waco, Texas, January 1st, 1897; July 1st, 1897, Jan. 1st, 1898; July 1st, 1898, Jan. 1st, 1899; July 1st, 1899; Jan. 1st, 1900; and July 1st, 1900, respectively, and to secure the payment of all of which notes which were executed to me by said J. C. Birkhead a vendor's lien is retained on the land herein conveyed, have granted, bargained, sold and conveyed, and by these presents do grant, bargain sell and convey unto the said J. C. Birkhead all that piece and parcel of land, situate, lying and being in the County of McLennan, State of Texas, in the City of Waco, and described as follows:

Beginning at the intersection of the west line of North First Street with the south line of the alley between Bridge Street
78 and Washington Street; thence S. 45 W. with said alley 50 feet; thence S. 45 E. 40 feet; thence N. 45 E. 50 feet to 1st street; thence N. 45 W. with said street 40 feet to beginning being a part of Lot No. 1, in Block No. 2, in the City of Waco.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said J. C. Birkhead his heirs and assigns forever; and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said J. C. Birkhead, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand this 25th day of May, A. D., 1896.

W. E. DUPREE.

STATE OF TEXAS, *County of McLennan:*

Before me, J. T. Harrison, a Notary Public, in — for McLennan County, Texas, on this day personally appeared W. E. Dupree, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 29th day of May, A. D. 1896.

[SEAL.]

J. T. HARRISON,
Notary Public, McLennan County, Texas.

STATE OF TEXAS, *County of McLennan:*

I, T. H. Brown, Clerk of the County Court of said County, do hereby certify that the above instrument in writing dated on the 25th day of May, 1896, with its certificate of authentication, was filed for record in my office the 3rd day of December, A. D., 1896, at 4:35 o'clock p. m. in deed records of said county in Vol. 144 on page No. 177.

Witness my hand the seal of the County Court of the said County at office in Waco, Texas, the day and year above written.

[SEAL.]

T. H. BROWN,
Clerk County Court, McLennan Co., Texas.
By R. S. VAUGHAN, *Deputy.*

(Indorsed:) Warranty deed. W. E. Dupree to J. C. Birkhead. Filed in my office for record this 3 day of Dec. 1895, at 3 o'clock p. m. T. H. Brown, Clerk, by R. S. Vaughan, Deputy. No. 79 274 Eq. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

DEED FROM J. C. BIRKHEAD TO MOLLIE E. DUPREE.

Filed March 2, 1905.

STATE OF TEXAS, *County of McLennan:*

Know all men by these presents, that I, J. C. Birkhead, of the County of McLennan, State of Texas, for and in consideration of one dollar to me in hand paid to me by Mrs. Mollie E. Dupree of the County of McLennan and State of Texas the receipt of which is hereby acknowledged, and for the further consideration that she, the said Mollie E. Dupree, has this day cancelled and surrendered to me the remaining unpaid purchase money notes given by me for said land hereby conveyed to-wit: four notes of $1,000.00 each dated May 25, 1896, due Jan. 1, 1899, July 1, 1899; Jan. 1900; and July 1, 1900, payable to W. E. Dupree, and all of which notes are now the separate property of M. E. Dupree, have granted, bargained, sold and conveyed and by these presents do grant bargain sell and convey unto the said Mollie E. Dupree as her separate property all that piece, or parcel of land situate lying and being in County of McLennan, State of Texas, and described as follows:

In the City of Waco, beginning at the intersection of the west line of North First Street with the south line of the alley between Bridge and Washington Streets. Thence S. 45 W. with said alley fifty feet; thence S. 45 E. 40 feet; then N. 45 E. 50 feet to First Street; thence N. 45, W. 40 feet to the beginning, being a part of Lot No. one (1), in Block No. two (2), of the City of Waco, and being same parcel of land conveyed to me by W. E. Dupree by deed dated May 25, 1896, and recorded in Vol. 14, page 177, of McLennan County deed records.

To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mollie E. Dupree to her sole and separate use and behalf of her heirs and assigns forever; and I do hereby bind myself, heirs, executors and administrators to warrant and forever defend all and singular and said premises unto the said Mollie E. Dupree, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

80 Witness my hand this the 8th day of May, A. D. 1902.

J. C. BIRKHEAD.

STATE OF TEXAS, *County of McLennan:*

Before me, Claude V. Birkhead, Notary Public, in and for McLennan County, Texas, on this day personally appeared J. C. Birkhead, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 11th day of February, A. D. 1903.

[SEAL.] CLAUDE V. BIRKHEAD,
Notary Public, McLennan Co., Texas.

STATE OF TEXAS, *County of McLennan:*

I, Thomas A. Caufield, Clerk of the County Court of said County, do hereby certify that the above instrument of writing dated on 8th day of May, 1902, with its certificates of authentication, was filed for record in my office this 26th day of March, A. D. 1903, at 2:40 o'clock p. m. and duly recorded the 4th day of April, A. D. 1903, at 11:25 o'clock a. m. in deed record of said County in Vol. 160 on page 22.

Witness my hand and seal of the County Court at office in Waco, Texas, the day and year above written.

[SEAL.] THOMAS A. CAUFIELD,
Clerk of County Court, McLennan Co., Texas,
By W. H. SADLER, *Deputy.*

(Indorsed:) 274 Eq. Warranty deed J. C. Birkhead to Mrs. Mollie E. Dupree. Filed in my office this 26th day of March, 1903, at 2:40 o'clock p. m. Thos. A. Caufield, Clerk County Court. By C. M. Collins, Deputy. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

81 DEED FROM W. E. DUPREE TO M. E. DUPREE.

Filed March 2, 1906.

STATE OF TEXAS, *County of McLennan:*

Know all men by these presents, that I, W. E. Dupree, of the County of McLennan, State of Texas, for and in consideration of one dollar and love and affection for my wife, M. E. Dupree, of the County of McLennan, State of Texas, granted, bargained, sold and conveyed, and by the presents have given do give, grant bargain, sell and convey unto the said M. E. Dupree all that piece or parcel of land situate, lying and being in the County of McLennan, State of Texas, in the City of Waco, and described as follows:

Beginning at the intersection of north line of Bridge Street with south-west or west line of First Street; thence N. 45 W. 125 feet along west line of First Street; thence S. 45 W. fifty feet; thence S. 45 E. 125 feet to Bridge Street; thence N. 45 E. 50 feet to place of beginning.

Together with all the rights, members, hereditaments, and appurtenances to the same belonging, or in anywise incident or appertaining, to have and to hold all and singular the premises above mentioned unto the said M. E. Dupree her heirs, and assigns forever; and I do hereby bind myself, heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said M. E. Dupree as separate property, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand this 2nd day of December, A. D. 1896.

W. E. DUPREE.

STATE OF TEXAS, *County of McLennan:*

Before me, W. H. Lastinger, a Notary Public of McLennan County, Texas, on this day personally appeared W. E. Dupree, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 3rd day of December, 1896.

[SEAL.] W. H. LASTINGER.
Notary Public, McLennan Co., Texas.

82 STATE OF TEXAS, *County of McLennan:*

I, T. H. Brown, Clerk of the County Court of said County, do hereby certify that the above instrument of writing dated on the 2 day of December, A. D. 1906, with its certificate of authentication was filed for record in my office the 4 day of Dec. A. D. 1896 at 7:55 o'clock a. m. and duly recorded the 5th day of December A. D. 1896, at 8:15 o'clock a. m. in deed records of said County in Vol. 108 on page 332.

Witness my hand and the seal of the County Court of McLennan County, at office in Waco, Texas, the day and year last above written.

[SEAL.] T. H. BROWN,
Clerk County Court, McLennan Co., Texas,
By CHAS. E. MOORE, *Deputy.*

(Indorsed:) Warranty deed. W. E. Dupree to M. E. Dupree. Filed for record this the 4 day of Dec. A. D. 1896. T. H. Brown, Clerk. By J. M. Vaughan, Deputy. 274 Eq. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Release from S. W. Slayden to W. E. Dupree, heretofore pointed at page 4.

* * * * * * * .

THE STATE OF TEXAS, *County of McLennan:*

I, Joney Jones, Clerk of the County Court of McLennan County, Texas, do hereby certify that the hereto attached and foregoing instrument of writing and certificate of authentication thereto was filed in my office for record on the 29 day of December, 1897, at 4:40 o'clock p. m., and recorded on page 389 of book 28, McLennan County, Trust Deed record, on the 8 day of Jan'y, 1898 at 10:10 o'clock a. m.

Given under my hand and seal of said County Court, at office in Waco, the date last above written.

[SEAL.] JONEY JONES,
Clerk County Court, McLennan Co., Texas,
By H. W. SADLER, *Deputy.*

(Indorsed:) 274 Eq. Release of deed of trust. S. W. Slayden favor of W. E. Dupree. Filed for registration in my office this 29 day of December A. D. 1897 at 4:40 o'clock p. m. Joney Jones, County Clerk McLennan County. By Chas. E. Moore, Deputy. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

83 *Release of Deed of Trust.*

Filed March 2, 1906.

STATE OF TEXAS, *County of McLennan:*

Whereas, W. E. Dupree for the purpose of securing the payment of five certain promissory notes for the sum of forty-five hundred ($900.00 each) dollars and interest in favor of O. Bailey dated at Waco, Texas, Dec. 31st, 1894, due January 1st, 1896, '97, '98, '99, and 1900, from the date thereof did convey unto W. W. Lastinger, trustee, by a deed of trust duly recorded in the records of McLennan County, Texas, in book 21, page 345, all that certain tract or parcel of land described in said deed of trust, lying and being in the County of McLennan, State of Texas, in the City of Waco.

Now, therefore, know all men by these presents that W. W. Lastinger, trustee, in said deed of trust named as such for and in consideration of the full payment and satisfaction of the said promissory notes, both principal and interest, the receipt whereof is hereby acknowledged, do hereby remise, set over, release and reconvey unto the said W. E. Dupree, his heirs and assigns, all and singular the property and premises in said deed of trust described, forever free and quit of the above named encumbrance.

In testimony whereof, I, W. W. Lastinger, trustee, hereunto subscribe my name in Waco, Tex., this the 29th day of Dec., A. D. 1897.

W. W. LASTINGER, *Trustee.*

STATE OF TEXAS, *County of McLennan:*

Before me, W. H. Lastinger, Notary Public in and for McLennan County, Texas, on this day personally appeared W. W. Lastinger, trustee, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this the 29th day of Dec. 1897.

[SEAL.] W. H. LASTINGER,
Notary Public, McLennan Co., Texas.

84 STATE OF TEXAS, *County of McLennan:*

I, Joney Jones, Clerk of the County Court of McLennan County, Texas, do hereby certify that the hereto attached and foregoing instrument of writing and certificate of authentication thereto was filed in my office for record on the 29th day of Dec. 1897, at 4:40 p. m. and recorded on page 96 of book 29, County T Deed Record, on the 8 day of January, 1898, at 10:15 o'clock a. m.

Given under my hand — seal of said County Court at office in Waco, on the date last above written.

[SEAL.] JONEY JONES,
Clerk County Court, McLennan County, Texas.
By R. S. ROSS, *Deputy.*

(Indorsed:) 274 Eq. Release of deed of trust. W. W. Lastinger, trustee favor of W. E. Dupree. Filed for registration in my office this 29 day of December, A. D. 1897, at 4 p. m. Joney Jones, County Clerk, McLennan County, Texas. By Chas. E. Moore, Deputy. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Transcript of Record on Appeal in the Case of J. C. Duke vs. W. E. Dupree et al.

Filed March 2, 1906.

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Caption.

Be it remembered, that at a regular and stated term of the Circuit Court of the United States, for the Northern District of Texas, begun and holden at Waco, on the 8th day of October, A. D. 1900, and ending on the 1st day of November, A. D. 1900, the Honorable Edward R. Meek, District Judge presiding, the following cause came on for trial, to-wit:

In the Circuit Court of the United States, Northern District of Texas, at Dallas.

No. 178. Equity.

J. C. DUKE
versus
W. E. DUPREE ET AL.

To the Judges of the Circuit Court for the Northern District of Texas, sitting in Equity:

James C. Duke, complaining of W. E. Dupree and M. E. Dupree, respectfully represents:

I.

That plaintiff is a resident and citizen of the State of Texas, and the defendants, W. E. Dupree and M. E. Dupree, are, each,

citizens of the State of Texas, and inhabitants of the Northern District of Texas, residing and having their respective domicile in the County of McLennan in said Northern District and that complainant has his domicile in the County of Dallas, in said Northern District of Texas.

II.

That heretofore, on the 31st day of December, 1894, the defendant, W. E. Dupree, for valuable consideration to him paid, executed his certain five promissory notes described as follows: Each note dated Dec. 31, 1894, and due 1, 2, 3, 4 and 5 years thereafter respectively, with 8 per cent. annual interest, signed by said W. E. Dupree, and payable to O. Bailey or order, with current rate of exchange on New York, with interest thereon at the rate of eight per cent. per annum until fully paid, said interest pay-
86 able annually on the first day of January in each and every year according to the terms of interest coupon notes, thereto annexed, with a special agreement in making and delivery of said notes that if any one of the annexed interest coupons remains unpaid for five days after maturity thereof, at the option of the said O. Bailey or the owner of said promissory notes, the whole principal with interest then accrued, shall at once become due and payable, and the holder may proceed to collect the same by sale under the deed of trust that day executed, or otherwise as the holder may elect.

III.

And on the same day, that is to say, Dec. 31, 1894, the said defendant, W. E. Dupree, for the purpose of securing said promissory notes, executed a trust deed or mortgage with power of sale on an undivided one-half interest in and to Lot No. 1, in Block 2, in the City of Waco, State of Texas, in McLennan County, as shown by the map of said city. Said Lot No. 1 in Block 2 fronts 50 feet on Bridge Street and runs back 165 feet to the alley. Said mortgage or trust deed, in which one W. W. Lastinger was named as trustee, further provides that in case of any failure or default on the part of W. E. Dupree to keep or perform any of the covenants or agreements therein contained, the said W. E. Dupree authorized and empowered the said trustee and made it his special duty, at the request of the holder of said notes at any time after default, to sell the said property in said deed of trust described, at public or private sale, and apply the proceeds, first, to the payment of the expenses of the sale; second, to the payment of the indebtedness in default, together with all interest thereon, and taxes and insurance on the property, and next, to the payment of a fee to the trustee for making the sale, and the remainder to be returned to the grantor in the trust deed, or his order. Said instrument contained a power in the holder of said notes to appoint a substitute trustee, in case of failure of said Lastinger to act, and contained other provisions not necessary here more particularly to set out, but a certified copy of said instrument for the information of the Court is hereby at-

tached, marked "Exhibit A," and prayed to be considered in connection with the allegations of this bill, and will be used on the trial of this cause as evidence on behalf of the complainant.

That after execution of said notes and said trust deed and delivery thereof to the said O. Bailey, he, the said O. Bailey, transferred and endorsed said notes to S. W. Slayden, who was the owner
87 and holder thereof on the 5th day of December, 1896, as well as on the 3rd day of December, 1896.

That on the 3rd day of December, 1896, the defendant W. E. Dupree, being largely indebted and being insolvent and in a failing condition, executed a certain mortgage or trust deed, with power of sale, and delivered the same to J. C. Birkhead, trustee, for the purpose of securing the indebtedness due by said W. E. Dupree to his creditors named in said instrument preferentially and in accordance with the provisions thereof, and conveyed by said instrument of date Dec. 3, 1896, certain stocks of goods, wares and merchandise, horses, wagons, sewing machines, and other personal property, and also real estate (but not the real estate covered by said mortgage of Dec. 31, 1894, hereinbefore mentioned), situated in the counties McLennan and Hill and Falls, in the State of Texas, and provided in said trust deed or mortgage executed to J. C. Birkhead as trustee, that the trustee shall take immediate and exclusive possession of all said property, inventory the same, and sell the same, and apply the proceeds of the sale of said property substantially as follows, viz: first to the payment of the claims of certain creditors named therein, whose claims amounted to about the sum of $38,160.14, and among whom were included said S. W. Slayden, whose claims consisted of the notes secured by said trust deed of date Dec. 31, 1894, and who had no other claim against the said Dupree or said estate, the class of creditors in which said S. W. Slayden was placed being enumerated in the exhibit to said trust deed, called "Exhibit A." After payment of the claim of Exhibit A, in full with interest, out of the proceeds were then directed to be paid certain creditors of the said W. E. Dupree, including Mansur & Tebbetts Implement Company, a corporation domiciled at St. Louis, Mo., and Washburn & Moen Mfg. Company, a corporation domiciled at Worcester, Massachusetts. The claims of the creditors mentioned amounting to about the sum of $54,877.79, and under the provisions of said trust deed these creditors, listed in Exhibit B to said trust deed, were to be paid ratably and to pro-rate amongst themselves, if there should not be sufficient proceeds left after paying off the creditors classified in Exhibit A.

And the said instrument then directed that after the payment in full of the creditors listed in Exhibit A, and also the payment in full of the creditors listed in Exhibit B, that if there should still remain proceeds, the same should be paid to certain creditors of the said W. E. Dupree listed in Exhibit C, whose claims amounted to about the sum of $118,574.05, who would prorate in whatever proceeds that might be arising under the trust deed, after
88 payment of the creditors in said trust deed preferred respectively in the list Exhibit- A and B, aforesaid.

III.

That on the 5th day of December, 1896, the said Mansur & Tebbetts Implement Company and the said Washburn & Moen Manufacturing Company brought their bill in this Honorable Court, which had jurisdiction thereof, against W. E. Dupree, the defendant herein, and against J. C. Birkhead and against Provident National Bank, which was one of the preferred creditors in said instrument, of date Dec. 3, 1896, and prayed for an establishment of their indebtedness against W. E. Dupree for the removal of said Birkhead as trustee, for the appointment of a receiver for the property conveyed to said Birkhead, trustee that as against said Provident Bank there should be a marshalling of securities, alleging that said Provident Bank held other securities for its indebtedness on which the complainants in said bill had no lien; alleging further that the property in the hands of the trustee was inadequate and insufficient to pay in full the complainants in the bill under the provisions of said trust deed; and that the provisions of said trust deed be carried out in so far as the same provided security through the decree of the Court and the administration of a receiver, and for general relief.

And on the 5th day of December, 1896, Frank F. Finks, Esq., was appointed receiver of the property then in the hands of Birkhead, trustee, by this Honorable Court, and said Finks immediately qualified by execution of bond as required by the order appointing him, and took the oath of office.

IV.

That afterwards, on Dec. 9, 1896, W. B. Belknap & Company, one of the creditors of said W. E. Dupree mentioned in said instrument of Dec. 3, 1896, and in Class C, thereof, exhibited his bill in this Honorable Court against W. E. Dupree and J. C. Birkhead and Provident National Bank and S. W. Slayden and Rose Bud Furniture Company and Mollie E. Dupree, the other defendant herein, and James B. Baker, and reiterated in substance the allegations of the bill heretofore filed by said Mansur & Tebbetts Implement Company, and the said Washburn & Moen Manufacturing Company, jointly, and in additions to said allegations alleged that the said Slayden held other securities than the property mentioned in said trust deed of Dec. 3, 1896, and on which the said
89 Belknap & Company possessed no lien and that out of the securities held by the said Slayden other than the property mentioned in said instrument of Dec. 3, there was abundance in value to pay his claim and prayed that the receivership theretofore granted be sustained and be made permanent and for marshalling of the securities held by the said Slayden and others, so that the rights of said Belknap and Company and the other creditors mentioned in said instrument of Dec. 3, 1896, might be protected inasmuch as the said Slayden held a lien on two funds, only one of which was available to the said Belknap & Company, and the other creditors mentioned in said instrument of date Dec. 3, 1896, and for general relief.

On a hearing had before the Honorable Charles Swayne, the receivership was made permanent and on the 12th day of December, 1896, a general order was made permitting the filing of interventions by persons interested in the property in the hands of the receiver, and on the same day an order of reference of intervention was made directing the same to be heard by the Standing Master. And on the 30th day of January, 1897, the said S. W. Slayden filed his answer to the said bill of Belknap & Company under oath admitting that he was the owner of four of the notes mentioned in said instrument of December 31, 1894, and that he had accepted the provisions of the instrument of December 3, 1896, as additional security for his debt against the defendant, W. E. Dupree, praying that his claim be established as a charge on the property in the hands of the receiver, in accordance with the terms of the trust deed of December 3, 1896.

V.

That on the 8th day of February, 1897, the receiver recommended that the personal property in his hands and custody be sold and on the same day an order was made directing the receiver to sell the personal property in his hands which in due course was sold and the receiver reported that his total receipts for the sale amounted to $62,829.22, and that the net amount realized after the payment of expenses was $54,474.44. That the total net proceeds of all property in the hands of receiver were only sufficient to pay the creditors of W. E. Dupree listed in said Exhibit B, the sum of 20 per cent. of their recoveries and insufficient to pay to the creditors listed in said Exhibit C any part of their recoveries.

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VI.

That on the 9th of March, 1897, the Judge in said cause made an order requiring that all parties claiming any interest in the proceeds of the sales of property made by the receiver should present their claims by intervention in the cause on or before the Rule Day of April, 1897, and in default thereof should thereafter be barred and precluded from participating in the distribution of the proceeds and further providing that each party should disclose under oath a description of any and all security that he might have for payment of his claims and that such claim be referred to the Master for his report.

That in response to said order the said S. W. Slayden filed a petition of intervention in said cause and receivership (the said two bills in equity having heretofore been consolidated by order of the Court), and claimed the payment of his indebtedness out of the fund then in the hands of the receiver and showed to the Court under oath that he held the security of said trust deed Exhibit A, hereto in addition to his claim on the fund in the Court.

VIII.

That the said W. E. Dupree and also the said M. E. Dupree, defendants herein, were original parties in said consolidated suit. That in addition thereto, the said Mollie E. Dupree, joined by her husband, W. E. Dupree, filed her intervention in the consolidated suit and also filed their answer to said bill exhibited against them by W. B. Belknap & Company, and all of said parties were fully before said Court, and fully represented therein. And on the 3rd day of December, 1896, and W. E. Dupree had conveyed the said Lot No. 1, Block No. 2, of Waco, to defendant, M. E. Dupree, by voluntary deed without valuable consideration.

IX.

That on the 3rd of May, 1897, after having heard the various interventions and claims against the funds in Court in said consolidated cause, the Standing Master, A. S. Lathrop, reported to this Honorable Court, and amongst other matters reported by him found in his said report in favor of the said S. W. Slayden for the amount of his notes aforesaid, that he be entitled to be paid out of the fund in Court preference to all creditors listed in Exhibit B, and
91 C, in said instrument of date December 3rd, 1896, and that the creditors listed in said Exhibit B, and C, be subrogated to the lien which said Slayden held by virtue of said trust deed of date December 31st, 1894, on the said real estate therein described.

X.

That on the 26th day of June, 1897, the said consolidated cause came on to be heard upon the bills, answers, pleas of intervention, Master's report and exceptions thereto, and the evidence, and this Honorable Court entered its final decree in said consolidated cause, and amongst other awards therein, awarded and decreed to the said S. W. Slayden a recovery and judgment against the said W. E. Dupree on his said notes and claim for the sum of $3,085.50 with interest on $2,805.00 thereof at the rate of 8 per cent. per annum, together with his costs in that behalf incurred with a lien on the fund in the registry of the Court, with priority thereon to all claims of the said creditors listed in Exhibit B and C of said instrument dated Dec. 3, 1896, and further in said decree provided as follows: "And it further appearing to the Court that the debt of the said S. W. Slayden against the said W. E. Dupree consists of vendor's lien notes executed by the said W. E. Dupree to O. Bailey and transferred by indorsement of the said O. Bailey to the intervener, S. W. Slayden, all dated Dec. 31, 1894, each in the sum of $900.00, the first maturing January 1st, 1898, the second maturing January 1st, 1899, and the third maturing January 1st, 1900, and bear interest at the rate of 8 per cent per annum, payable annually and evidenced by interest coupons attached to said notes, said notes being secured by a vendor's lien on Lot 1, in Block 2, of the City of Waco, McLennan County, Texas, it is hereby ordered that upon payment to the said intervener of his recovery out of the funds in the registry

of the Court, the said intervener shall at once deliver to F. F. Finks, receiver, herein, said notes and said interest coupons thereon, indorsed to the said Receiver without recourse, and said F. F. Finks, receiver, is hereby ordered forthwith to sell said notes and interest coupons at public or private sale for cash, and pay the net proceeds of said sale into the registry of the Court to be applied as the other funds in the registry of this cause."

XI.

That thereafterwards out of the funds then in the registry of this Court, in said consolidated cause, the said S. W. Slayden did
92 receive the full amount of the principal and interest on said notes and coupons, and did then in pursuance to said decree indorse and transfer said notes to the said F. F. Finks, receiver, and the said F. F. Finks did thereupon in pursuance of said decree expose said notes for sale in all things in accordance with directions to him in said decree contained, and your orator at such sale purchased said notes together with the interest coupons thereon for the sum of $300.00, and the said Frank F. Finks, did report to this Honorable Court in his final report the sale of said notes and coupons by including therein the amount realized therefrom, to-wit the sum of $300 which was paid to him by your orator, which said report of the said receiver, F. F. Finks, was confirmed and approved and said receiver was discharged upon the payment into the registry of the Court of the moneys in his hands, including said $300.00 paid him by your orator, and the said Frank F. Finks did indorse said notes and said coupons to your orators, who is now the owner and holder thereof.

XII.

That the matter in dispute herein is of a civil nature and exceeds in value the sum of $2,000.00 exclusive of interest and costs.

XIII.

Your orator would further represent that the defendants, W. E. Dupree and M. E. Dupree, now claim that the performance of said decree in accordance with the terms thereof did not operate as a subrogation of the lien held by said S. W. Slayden on said Lot No. 1, in Block 2, in the City of Waco, but operated as a payment and discharge of said indebtedness and release of said lien, and are claiming that said notes have been fully paid off and the lien thereon fully discharged, and that no indebtedness or lien exists in favor of your orator or any other person by occasion of the execution of said notes and the lien given by said deed of trust of date December 3, 1894.

XII. (XIV.)

Your orator avers that the matter of subrogation aforesaid was fully litigated and determined in said consolidated suit between the said defendants who were parties thereto, and the creditors in

Exhibits B and C of the aforesaid instrument of date December 3, 1894, and your orator by virtue of his purchase at said receiver's sale is entitled to the benefits of the said original bills and of
93 the proceedings upon them, and of the aforesaid decree in said cause, and is entitled to have said decree rendered effectual, and to have said decree so reformed as to specifically decree the subrogation in favor of your orator to the lien upon said Lot No. 1, in Block 2, in the City of Waco, created by said mortgage of date December 31, 1894, and to have the said defendants answer these premises, but not under oath (the benefit whereof is expressly waived by the complainant), but that your orator may have the full benefit of the said suit and the proceeding therein against the said defendants herein named, your orator prays:

1. That leave be given your orator to file this bill.

2. That it be decreed that your orator be entitled to stand in the place of the complainants in said original bills, and to have the benefit of the proceedings in said consolidated suit and of the decree rendered therein, and especially said decree of February 26, 1897, and that said decree be aided and rendered effectual in behalf of your orator and against the said defendants herein named and each of them. That the said mortgage of date Dec. 31st, 1894, be foreclosed in favor of your orator and the said property therein mentioned be sold in satisfaction of the debt evidenced by notes and coupons which has been paid as hereinbefore shown to the said S. W. Slayden out of the funds in the registry of this Court, to the amount of which said payment which your orator alleges to have been the sum of $3085.50-100, together with the interest thereon as provided in said notes and coupons, it being hereby expressly provided in said deed of trust of date Dec. 31st, 1894, that failure to pay the interest on said note or either of them, shall, at the option of the holder of said note, mature the principal thereof, and your orator avers that such default has been made and the whole amount of said notes has become due and that your orator have an order of sale of said property described in the last named mortgage, and a subpœna against the defendant, W. E. Dupre and M. E. Dupre, commanding them under a certain penalty to answer this bill, but not under oath (answer under oath being hereby expressly waived), and that your orator be granted such other and further relief in the premises as the nature and circumstances of the case may require and to your Honors may seem meet.

May it please your Honors to grant to your orator a writ of subpœna or an order directed to the defendants and each of them, commanding him and them at a certain time to be therein specified to
94 be and appear before this Honorable Court, then and there to answer the premises and to abide the orders and decrees of the Court herein and that said defendants and each of them may appear herein according to law.

J. C. DUKE.
By A. P. McCORMICK,
McCORMICK & SPENCE.
His Solicitors.
J. M. McCORMICK.
Of Counsel.

Indorsed as follows: No. 178 Equity. J. C. Duke *vs.* W. E. Dupree *et al.* Supplemental Bill. Filed March 27, 1899. J. H. Finks, Clerk.

EXHIBIT "A."

Deed of trust from W. E. Dupree to W. W. Lastinger, heretofore printed on page 73.

* * * * * * *

Notary No. 148.

Filed for record Dec. 12, 1895, at 10 o'clock A. M. Recorded Dec. 12th, at 12:40 P. M.

T. H. BROWN, *Clerk.*
By C. C. LASTINGER, *D. C.*

THE STATE OF TEXAS, *County of McLennan:*

I, Jonev Jones, Clerk of the County Court and ex-officio recorder of McLennan County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a certain Deed of Trust from W. E. Dupree to O. Bailey, as the same appears on file in county clerk's office of McLennan County.

In testimony whereof and to certify which I hereunto sign my name officially and affix the seal of said County Court at my office in the City of Waco, this 9th day of October, 1897.

[SEAL.] JONEY JONES,
County Court and Ex-Officio Recorder,
McLennan County, Texas.

(Indorsed as follows:) J. C. Duke *vs.* W. E. Dupree. Certified Copy. W. E. Dupree to D. T. Bailey, Beneficiary. Filed by and to be used on the trial as evidence on behalf of plaintiff. Filed May 6th, 1898. Jno. H. Sears, Clk. Dist. Ct. McL. Co. Texas, by Ben Kendall, D.

95 *Motion of Plaintiff to File Supplemental Bill.*

In the United States Circuit Court for the Northern District of Texas, at Dallas.

No. —. Equity.

J. C. DUKE
vs.
W. E. DUPREE.

Now comes the complainant and moves the Court for leave to file his supplemental bill and of the above name and style, and tender said bill herewith and prays that this motion may be heard at chambers on the rule day in April or as soon thereafter as counsel can be heard.

McCORMICK & SPENCE,
Solicitors for Complainants.

Defendants hereby accept service of notice of the above motion and agree that same may be heard by the Court at Chambers in Waco on April 10th, 1899.

W. E. DUPREE,
M. E. DUPREE,
By their Solicitors, HARRISON & HARRISON AND
JONES & SLEEPER.

March 29th, 1899.

(Indorsed as follows:) No. 178 Equity. J. C. Duke *vs.* W. E. Dupree *et al.* Motion of plaintiff to file supplemental bill. Filed 27th day of March, 1899. J. H. Finks, Clerk, by Chas. H. Ledbum, Deputy.

Opposition of Defendants to Complainant's Motion to File Supplemental Bill.

In U. S. Circuit Court at Waco, in Equity

J. C. DUKE
vs.
W. E. DUPREE ET AL.

Now comes defendants, W. E. Dupree and M. E. Dupree, and file this their opposition to the motion of complainant for
96 leave to file his said supplemental bill attached to said motion on the following grounds, to-wit:

1st. Because it appears from said supplemental bill that the same is in the nature of a bill of review seeking a different kind of relief on a different principal from that on which the original decree referred to therein is given. (Story Eq. p. I. 422) and no reason whatever is shown why by proper attention the reformation and relief prayed for in said supplemental bill could not have been had in the original case.—Cames *vs.* Ament, 1 A. K. Marsh. 159.

2nd. Because said supplemental bill comes too late, more than six months having elapsed since the original decree sought to be reformed was rendered.

3rd. Because complainant as assignee of the notes set out in said supplemental bill has no authority to bring such suit.

4th. Because all parties to the decree sought to be reformed are not made parties to the said supplemental bill.

5th. Because, as shown by the affidavit hereto attached and prayed to be taken as a part of defendants' reply to said motion, complainant is barred by his laches from filing such supplemental bill, for the reason that heretofore on, to-wit the 6th day of May, 1898, he filed his suit in the District Court of McLennan County, against these defendants seeking therein, a recovery of personal judgment on the notes described in said supplemental bill, against defendant, W. E. Dupree, and a foreclosure of a lien set out against both of these defendants, which suit he afterwards on, to-wit, the

3rd day of March, 1899, dismissed and now seeks the same relief here.

6th. Because the said bill shows no equity and is devoid of equity and would be bad and is bad on general demurrer.

Wherefore they say the said bill ought not to be filed and pray that this Honorable Court refuse the said motion to file.

W. E. DUPREE.
M. E. DUPREE.
D.
JONES & SLEEPER AND
HARRISON & HARRISON.
Solicitors for Defendant.

97 THE STATE OF TEXAS, *County of McLennan:*

Before me, the undersigned authority, on this day personally appeared W. E. Dupree who being by me duly sworn on his oath stated J. C. Duke, the complainant, filed suit against this affiant and his wife, M. E. Dupree, in the District Court of McLennan County, Texas, on May 6th, 1898, on the identical notes the foreclosure of which is sought in the supplemental bill of complainants herein, and foreclosure of said notes was sought in said State Court. That this affiant and said M. E. Dupree was served with citations in said cause and promptly answered. That said cause in the District Court was continued by consent of parties from term to term until the 3rd day of March, 1899, when said J. C. Duke after so electing to seek relief in said State Court and after ascertaining the defenses of affiant and said M. E. Dupree to his said action voluntarily dismissed his said suit and had the same stricken from the docket.

W. E. DUPREE.

Sworn to and subscribed before me this 8th day of April, A. D. 1899.

JAMES A. HARRISON,
Notary Public, McLennan County, Texas.

(Indorsed:) No. 178 Equity. J. C. Duke *vs.* W. E. Dupree *et al.* In Equity. Opposition of defendants to complainant's motion to file supplemental bill. Filed April 10th, 1899. J. H. Finks, Clerk.

Order on Application for Leave to File Bill.

In the United States Circuit Court at Waco, April Term, 1900.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

This day coming on to be heard the application of complainant to file, with leave of the Court, his bill, and the Court having heard the said application and the opposition of defendants thereto and the

arguments of counsel it is ordered that the bill may be filed as of March 27th, 1899, to which defendants excepted, and the
98 defendants having appeared, they are required to plead, answer or demur to said bill on or before the rule day in June, 1900.

EDWARD R. MEEK.
U. S. Dist. Judge.

Dated April 30, 1900.

(Indorsed as follows:) No. 178 Eq. J. C. Duke *vs.* W. E. Dupree *et al.* Order on application for leave to file bill. Filed April 30, 1900. J. H. Finks, Clerk.

Demurrer of Defendants to Complainant's Supplemental Bill.

In the United States Circuit Court for the Northern District of Texas, at Waco.

No. 178. Equity.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

The joint demurrer of defendants, W. E. Dupree and M. E. Dupree, his wife, to the supplemental bill of complaint of J. C. Duke, the above named plaintiff.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer showeth:

1. That the said plaintiff has not in and by said bill made or stated such a cause as doth or ought to entitle him any such relief as thereby sought and prayed for, from or against these defendants.

2. That it appears by the said bill that there are divers other persons who are necessary parties to said bill, but who are not made parties thereto. And in particular it appears that Mansur Tebbetts Implement Company, Washburn Moen Manufacturing Company and W. B. Belknap & Company were complainants in the decree which plaintiff by said bill seeks to reform and correct, and that S. W. Slayden was holder of the vendor's lien notes and the intervener in said decree which plaintiff by his said bill seeks so to reform as to subrogate himself to the said Slayden vendor's
99 lien; and said Mansur Tebbetts Implement Company, Washburn Moen Manufacturing Company, W. B. Belknap & Co. and S. W. Slayden are necessary parties to said bill; but neither of them are made parties thereto.

3. That it does not appear from said bill in the intervention of said Slayden as set out in paragraph six of said bill that any issue

was made by either of the complainants or any creditor in said consolidated causes by their pleadings setting up a claim of subrogation to such lien, and it does not appear that there were any pleadings on which to base the finding of the master as set out in paragraph nine of plaintiff's said bill.

4. That it does not appear from plaintiff's said bill that there was any pleadings in said consolidated causes by any complainant or creditor therein on which to base the decree in said causes as set out in paragraph ten of plaintiff's said bill, and no such relief as by said portion of said decree is granted appears to have been asked or prayed for by any party to said causes.

5. That it does not appear from plaintiff's said bill that by the order of reference to the master as set out in paragraph seven of said bill, he was directed or authorized to inquire into or report to the Court rights of complainants or creditors in said consolidated causes to subrogation to the said S. W. Slayden vendor's lien, nor does it appear from said bill that was he directed to make any investigation or report from which authority to report on said subrogation as set out in paragraph nine of said bill could be inferred.

6. That it does not appear from said bill that either of these defendants had notice of any issue made in the intervention of S. W. Slayden in said causes of the right of creditors to be subrogated to said vendor's lien.

7. That it appears from said bill in paragraph eight thereof that on Dec. 3rd, 1896, W. E. Dupree conveyed to Mollie E. Dupree said Lot 1, Block 2, of Waco, and that all the proceedings set out in said bill occurred subsequent thereto, and it does not appear from said bill that by any pleading to which said M. E. Dupree was a party, any relief was sought having for its object the subrogations of the complainants or creditors in said cause to the vendor's lien or trust deed set out in paragraph six, nine and ten of plaintiff's said bill, nor does it appear from said bill that there was any adjudica-
100 tion by the decree in said causes in respect to said M. E. Dupree's rights or interest in said Lot 1, Block 2, of Waco.

8. That said bill seeks a reformation of the original decree in said consolidated causes, and shows no excuse whatever why the relief now sought was not asked or obtained in the original causes and decree.

9. That said bill shows no reason why a specific decree of subrogation and foreclosure in favor of said complainants and creditors was not rendered in the original decree, although it appears from paragraph two of said bill that by the act of said W. E. Dupree in giving the trust deed as set out therein and the act of said Slayden in accepting the same as set out in paragraph six of said bill, said vendor's lien notes were matured and said Slayden entitled to full payment thereof out of said property conveyed in said deed of trust.

10. That said bill seeks a reformation of the original decree in said causes, which can only be done by appeal or bill of review.

11. That plaintiff is barred of his laches and has no right according to his own showing to maintain this bill for the reforming of said original decree, because it appears from said bill that more than six months have elapsed since said original decree was passed.

12. That it does not appear from said bill as set out in paragraph four thereof what the "other securities" held by S. W. Slayden consisted of, and which by the prayer in said consolidated cause were sought to be marshalled in order to preserve the rights of the complainant and other creditors mentioned in said bill of W. B. Belknap & Company.

13. That it appears from plaintiff's said bill that all the parties thereto, plaintiff and defendant, are citizens of the same state, to-wit: the State of Texas, and therefore this Court has no jurisdiction to hear and determine this cause.

14. That it appears from paragraph eleven of said bill that plaintiff herein is merely the assignee of the notes described in paragraph ten of said bill, and as such, can not bring said bill to reform and correct the original decree in said consolidated causes under and by virtue — he claims to have purchased said notes.

101 15. That by the constant rules of this Court no supplemental bill of review or in the nature thereof ought to be admitted to alter or change matter decreed, but only for error in law appearing in the body of the decree as it is drawn up and enrolled or for a new matter arising since the decree or such matter of which the plaintiff in such bill could not have notice at the time of the decree; but the matter assigned by said supplemental bill for cause of reformation and modification or neither any error in law appearing upon the body of said decree nor any such new matter as aforesaid, but a misjudgment in matter of form only, and not in point of right.

Wherefore, defendants respectfully demand the judgment of this Court whether they shall be compelled to make any further or other answer to said bill or any of the matters or things therein contained and pray*ed* to be *reince* dismissed with their reasonable costs in this behalf sustained.

JAMES A. HARRISON,
JONES & SLEEPER,
Solicitors for W. E. and M. E. Dupree.

THE STATE OF TEXAS, *County of McLennan:*

W. E. Dupree, for himself and as the agent and representative of his wife, M. E. Dupree, make solemn oath and says that the foregoing demurrer is not interposed for delay.

W. E. DUPREE.

Sworn to and subscribed before me this 4th day of April, A. D. 1900.

J. H. FINKS,
U. S. Comm'r.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. M. SLEEPER,
Of Counsel for Defendant.

(Indorsed:) No. 178 Equity. J. C. Duke *vs.* W. E. Dupree *et al.* Demurrer of defendants to complainant's supplemental bill. Filed June 4th, 1900. J. H. Finks, Clerk.

102 *Order Sustaining Demurrer of Defendants and Dismissing Complainant's Supplemental Bill.*

No. 178. Equity.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

This cause having come on to be heard this 15th day of October, A. D., 1900, upon the demurrers of the defendants, W. E. Dupree and M. E. Dupree, to the supplemental bill of complaint, J. C. Duke filed herein as of the 27th day of March, A. D. 1899; and the said demurrers having been argued by counsel for complainant and defendants, and ther-upon upon consideration thereof, it is ordered, adjudged and decreed by the Court that said demurrers of defendants, W. E. Dupree and M. E. Dupree, to the said supplemental bill of complaint, J. C. Duke be, and they are hereby in all things sustained.

It is further ordered, adjudged and decreed that the said supplemental bill of complaint, J. C. Duke, be, and the same is hereby dismissed with costs to the said defendants to be taxed against the said complainant, J. C. Duke, for which let execution issue.

EDWARD R. MEEK, *Judge*.

(Indorsed:) No. 178 Equity. J. C. Duke *vs.* W. E. Dupree *et al.* Order sustaining demurrers of defendants and dismissing complainant's supplemental bill. Filed Oct. 25th, 1900. J. H. Finks, Clerk.

Decree on Demurrer.

In the United States Circuit Court for the Northern District at Waco.

En Equity. No. 178.

J. C. DUKE, Trustee,
vs.
W. E. DUPREE ET AL.

Upon application of the complainants, the order heretofore entered in this cause, at this term of the Court, dismissing complainant's bill, is hereby modified, and it is ordered, adjudged and decreed that the demurrers of the defendants to complainant's bill be and the same are hereby sustained and said bill is dismissed, but the dismissal of said bill is without prejudice to complainant's right to fur-

ther prosecute his cause of action against defendants, if any
103 he have, attempted to be set up in said bill, and the complainant is hereby granted leave to file a supplemental bill herein on or before the rule day in December, 1900.

This the 26th day of October, A. D. 1900.

EDWARD R. MEEK,
U. S. District Judge.

No opposition. W. M. SLEEPER.

(Indorsed:) No. 178 Equity. J. C. Duke, Trustee, *vs.* W. E. Dupree. Decree on Demurrer. Filed Oct. 30th, 1900. J. H. Finks, Clerk. Order setting decree aside, etc.

Agreement.

In the United States Circuit Court at Dallas.

No. 178. Equity.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

Whereas the motion to file supplemental bill in above cause was filed in the United (States) Circuit Court on the equity side of the docket at Dallas, Texas, and service of said motion accepted by defendants upon condition that the said motion should be heard, and if granted, the bill filed on the equity side of the docket in the United States Circuit Court at Waco, Texas.

And whereas a hearing was had on said motion at the April term, 1900, and the motion granted by the Court, and by error of the Clerk at Waco, the said motion together with the plaintiff's supplemental bill was returned by the Clerk at Waco to the Clerk at Dallas, Texas, who now has the custody of the same.

Now therefore, it is agreed by and between the complainant in said supplemental bill, J. C. Duke, and the defendants, W. E. Dupree and M. E. Dupree, that the said supplemental bill shall be returned to the Clerk at Waco, to be filed there in accordance with the understanding and agreement between all parties.

McCORMICK & SPENCE.
Solicitor of Complainant, J. C. Duke.
JAS. A. HARRISON,
W. M. SLEEPER.
Solicitors for Defendants, W. E. Dupree and M. E. Dupree.

(Indorsed:) No. 178 Equity. J. C. Duke *vs.* W. E. Du-
104 pree *et al.* Agreement. Filed 27th day of Sept., 1900. J. H. Finks, Clerk. By Chas. H. Lehmm, Deputy.

Petition on Appeal.

The Circuit Court of the United States for the Northern District of Texas.

No. 178. Equity.

J. C. DUKE
vs.
W. E. DUPREE and M. E. DUPREE.

The above named plaintiff conceiving himself to be aggrieved by the decree made and entered on the 25th day of October, A. D. 1900, and the decree modifying the same made and entered on the 26th day of October, 1900, and filed on the 30th day of October, 1900, both in the above entitled cause, does hereby app-al from said orders and decrees to the United States Circuit Court of Appeals for the Fifth Circuit for the reason specified in the assignment of error which is filed herewith, and he prays that this bill may be allowed and that a transcript of the record, proceedings and papers upon which said orders and decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

McCORMICK & SPENCE,
Attorneys for J. C. Duke.

Dated February 8th, 1901.

The foregoing claim of appeal is allowed.

EDWARD R. MEEK,
District Judge.

Dated February 12, 1901.

(Indorsed:) No. 178 Equity. J. C. Duke *vs.* W. E. Dupree *et al.* Petition on Appeal. Filed Feb'y 13th, 1901. J. H. Finks, Clerk.

105 *Appeal Bond.*

In the District Court of the United States for the Northern District of Texas.

No. 178. Equity.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

Know all men by these presents that we, J. C. Duke, as principal, and the other subscribers hereto as sureties, are held and firmly bound unto the defendants, W. E. Dupree and M. E. Dupree, in the full and just sum of five hundred ($500.00) dollars

to be paid to the said defendants, W. E. Dupree and M. E. Dupree, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this the 8th day of February, in the year of our Lord, one thousand nine hundred and one.

Whereas lately, at a Circuit Court of the United States for the Northern District of Texas, in a suit depending in said Court, between J. C. Duke, plaintiff, and W. E. Dupree and M. E. Dupree, defendants, a decree was rendered against the said J. C. Duke, and another decree modifying the same was rendered, and the said J. C. Duke having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and the citation directed to the said W. E. Dupree and M. E. Dupree, citing and admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at the City of New Orleans, in said Circuit at the expiration of thirty days. Now, the condition of the above obligation is such that if the said J. C. Duke shall prosecute said appeal to effect and answer for all damages and all costs if he fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals, using scroll for seal, the day first above written.

J. C. DUKE.
By McCORMICK & SPENCE.
His Attorneys.

J. M. McCORMICK.
WENDEL SPENCE.

106 Approved:

EDWARD R. MEEK.
District Judge.

(Indorsed:) No. 178. In the District Court of the United States for the Northern District of Texas. J. C. Duke *vs.* W. E. Dupree *et al.* Appeal bond. Filed Feb'y 13th, 1901. J. H. Finks, Clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Northern District of Texas.

No. 178. In Equity.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

And now, on the 12th day of February, 1901, *came* the plaintiff, by McCormick & Spence, his solicitors, and says that the de-

cree in said cause originally entered and the decree modifying the same, are erroneous and against the just rights of said plaintiff, for the following reasons:

1. Because the first demurrer of the defendants to the complainant's bill, which was a general demurrer to the bill, for want of equity, should not have been sustained by the Court, for the reason that said bill set forth an equitable cause and facts properly pleaded, showing the plaintiff entitled to relief as prayed.

2. Because the Court should not have sustained the second demurrer of the defendants to the complainant's bill, which was a demurrer suggesting a defect of parties, for the reason that the parties mentioned and set forth in said demurrer were not necessary parties, and the relief prayed for by the plaintiff did not in any way affect the rights of either of said persons.

3. Because the third demurrer of the defendants to the complainant's bill should not have been sustained, but should have been overruled, for the reasons that the allegations of the bill shows Slayden had intervened on his claim in the original suit to which this proceeding is ancillary and had been awarded a payment out of
— therein conditioned on subrogation of said fund to his
107 securities for its reimbursement. And the allegations of the bill in respect to said matter were sufficient to disclose the validity of the original decree providing for the reimbursement of the fund out of the proceeds of Slayden's other security.

4. Because the Court erred in sustaining the fourth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said fourth demurrer.

5. Because the Court erred in sustaining the fifth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said fifth demurrer.

6. Because the Court erred in sustaining the sixth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer and, was not demurrable by reason of the matters set forth in said sixth demurrer.

7. Because the court erred in sustaining the seventh demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said seventh demurrer.

8. Because the Court erred in sustaining the eighth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said eighth demurrer.

9. Because the Court erred in sustaining the ninth demurrer of defendants to complainant's —, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said ninth demurrer.

10. Because the Court erred in sustaining the tenth demurrer of defendants to complainant's bill, for the reason that the bill was

not subject to such demurrer, and was not demurrable by reason of the matters set forth in said *eleventh* [tenth] demurrer.

11. Because the Court erred in sustaining the eleventh demurrer of defendants to complainant's bill, for the reason that the bill was — subject to such demurrer, and was not demurrable by reason of the matters set forth in said eleventh demurrer.

108 12. Because the Court erred in sustaining the twelfth demurrer of defendants to complainant's bill, for the reason that the bill was — subject to such demurrer, and was not demurrable by reason of the matters set forth in said twelfth demurrer.

13. Because the Court erred in sustaining the thirteenth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said thirteenth demurrer.

14. Because the Court erred in sustaining the fourteenth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said fourteenth demurrer.

15. Because the Court erred in sustaining the fifteenth demurrer of defendants to complainant's bill, for the reason that the bill was not subject to such demurrer, and was not demurrable by reason of the matters set forth in said fifteenth demurrer.

16. Because the Court erred in dismissing complainant's bill for the reason that no demurrer urged thereto by the defendants was well taken in equity, and the Court should have overruled said demurrers and each of them, and required the defendant to answer this bill.

Wherefore, the said plaintiff prays that the said decree originally entered and the decree amendatory thereof be reversed, and that the Court may be directed to overrule said demurrers and require the defendants to answer said bill, and to proceed further as equity may require.

McCORMICK & SPENCE.
Solicitors for Plaintiff.

(Indorsed as follows:) No. 178 Equity. In the Circuit Court of the United States for the Northern District of Texas. J. C. Duke *vs.* W. E. Dupree *et al.* Assignment of Errors. Filed Feb. 13th, 1901. J. H. Finks, Clerk.

* * * * * * *

109 (*Clerk's Certificate.*)

— J. H. Finks, Clerk of the Circuit Court of the United States for the Northern District of Texas, do hereby certify the foregoing and attached 30 pages of typewriting to contain a true and correct copy of the record in cause No. 178 Equity, entitled J. C. Duke *vs.* W. E. Dupree *et al.*, as the same appears on file and of record in my office at Waco.

In testimony whereof I hereunto sign my name officially and affix the seal of said Court, at Waco, this the 26th day of February, A. D. 1901.

J. H. FINKS, *Clerk.*

(Indorsed:) No. 274 Eq. Transcript of Record. United States Circuit Court of Appeals, Fifth Circuit. No. 1045. J. C. Duke, Appellant, *versus* W. E. Dupree *et al.*, Appellees. Appeal from U. S. Circuit Court, Northern District of Texas. Original record filed April 8, 1901.

Certified Copy of the Judgment of the Circuit Court of Appeals Affirming Judgment of Lower Court in the Case of J. C. Duke vs. W. E. Dupree.

Filed March 2, 1906.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1902.

No. 1045.

J. C. DUKE
vs.
W. E. DUPREE ET AL.

Appeal from the United States Circuit Court, Northern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Parlange, District Judge.

By the COURT. We find no error in the rulings of the trial Judge nor on the face of the record and the decree of the Circuit Court is affirmed.

110 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Ledoux, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from — to —, inclusive, contain a true copy of the opinion of the Court in the Case of J. C. Duke *versus* W. E. Dupree *et al.*, No. 1045, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals at the City of New Orleans, Louisiana, this 22d day of December, A. D. 1902.

CHARLES H. LEDOUX,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

(Indorsed:) No. 274 Eq. Cert. copy of Opinion of Court. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Parts of the Record on Appeal in the Case of W. W. Evans vs. Mansur & Tebbetts Implement Co.

Original Bill.

Filed December 5th, 1896.

THE UNITED STATES OF AMERICA, *Western District of Texas:*

In the Circuit Court of the United States for the Northern District of Texas, at Waco. In Equity.

To the Honorable Judges of said Court:

Mansur & Tebbetts Implement Company, a private corporation, organized under the laws of the State of Missouri, and citizens of the State of Missouri, domiciled at St. Louis, Mo., and Washburn & Moen Manufacturing Company, a private corporation organized under the laws of the State of Massachusetts, and a citizen of the State of Massachusetts, domiciled at Worcester, Massachusetts, bring this
111 their bill against W. E. Dupree of Waco, Texas, a citizen of Texas and an inhabitant of the Northern District of Texas; and against J. C. Birkhead of Waco, a citizen of the State of Texas and an inhabitant of the Northern District of Texas; and against Provident National Bank, a private corporation, organized under the laws of the State of Texas; and humbly complaining unto your Honors, your orators aver:

That the said defendant, W. E. Dupree, for a number of years prior to the 3rd day of Dec., 1896, was engaged in business at the City of Waco, Texas, and other cities and towns in the State of Texas, carrying on and conducting a large wholesale and retail business consisting of the buying and selling machinery, farming implements, hardware, wagons, buggies, barbwire, queensware, furniture, and a large assortment of similar goods; that the said defendant, W. E. Dupree, had prior to said 3rd day of Dec., 1896, accumulated in said city of Waco, Texas, a very large amount of such merchandise as he dealt in, as aforesaid, amounting to about the value of, approximately, thirty-five thousand dollars, and had prior to said 3rd day of Dec., 1896, accumulated in the town of Rosebud, Texas, another stock of goods, amounting in value, as your orators are informed and believe, to the sum of twelve thousand dollars, and had also accumulated a stock of goods of like character in the town of Mount Calm, Texas, amounting in value as your orators are informed and believe, to about the sum of thirteen thousand dollars, and the said W. E. Dupree, prior to said date, had, in addition to the stocks of goods hereinbefore mentioned, accumulated a stock of goods in the town of McGregor, Texas, amounting in value, as your orators are informed and believe, to the sum of six thousand five hundred dollars; and that said stocks of goods were bought by said defendant, W. E. Dupree, entirely on a credit, and, in addition to the goods which said W. E. Dupree had prior to said date sold very large amounts of goods, amounting in

value, as your orators are informed and believe, to the sum of one hundred and fifty thousand dollars, for which the said Dupree received from the purchasers thereof negotiable promissory notes of like amount in payment, and said goods converted by said W. E. Dupree in negotiable promissory notes were as your orators are informed and believe also purchased by said W. E. Dupree on a credit; and your orators are informed and believe and aver that the said W. E. Dupree has never paid for said goods sold by him as aforesaid, or if he has paid for any part thereof, then the part paid is so small in amount *and* almost the entire value of said goods so sold is now owing by said Dupree to his creditors and, among others, to your orators.

112 That during the conduct of said business for the last several years the defendant, J. C. Birkhead, has been the confidential clerk of the defendant Dupree, working for the said defendant Dupree on a salary and entirely in the confidence of the said defendant Dupree and under his dominion and control; and that said defendant Birkhead has not during said term of his employment with the defendant Dupree had or conducted any independent business of his own, but has habitually and only acted in business as the employee and confidential clerk of the defendant Dupree.

Your orators aver, on information and belief, that preparatory to the execution of the trust deed hereinafter mentioned, and in contemplation of his insolvency, the said defendant Dupree had fraudulently and colorably conveyed to the defendant Birkhead a large amount of property, both personal and real, an accurate description of which your orators cannot furnish, which is now being held by said defendant Birkhead, in his name and under apparent ownership by him, but for the real benefit of the defendant Dupree.

That prior to the 3rd day of Dec., 1896, the defendant W. E. Dupree made, executed and delivered to the defendant Provident National Bank his certain promissory notes in writing, payable to said bank, amount- in the aggregate to the sum of $15,076.80, and prior to said date, the said W. E. Dupree, defendant, had delivered to the defendant Provident National Bank collateral securities to said notes, consisting, as your orators are informed and believe, of first class farmers' promissory notes and evidences of indebtedness derived by said defendant W. E. Dupree, from the operation of his business as aforesaid; and that on the 3rd day of December, 1896, the said Provident National Bank held said collateral securities, a more complete description of which your orators are not able to obtain, to secure the payment of said indebtedness evidenced by the said promissory notes, executed by said defendant Dupree and delivered to said defendant Provident National Bank, and your orators aver that the said Provident National Bank now holds the said notes of defendant W. E. Dupree, and also the said collateral notes deposited by said defendant Provident National Bank to secure his said indebtedness to it; that, by virtue of a contract between the defendant Dupree and the defendant, Provident National Bank, the said Provident National Bank has full and complete right to collect said collateral securities and appropriate the proceeds to the payment, liquidation and discharge of said indebtedness owing by said Dupree to said bank; and that your or-

ators further aver that said collateral securities are entirely collectable and furnish adequate and complete security to said defendant
113 Provident National Bank out of which to enforce the collection of the indebtedness owing by the defendant Dupree to said bank.

Your orators further aver that on and prior to the 3rd day of Dec., 1895, the defendant W. E. Dupree was indebted to his various creditors in the sum of at least $215,000 and on said 3rd day of Dec., 1895, the said W. E. Dupree was indebted to your orator Mansur & Tebbetts Implement Company for goods, wares, and merchandise furnished by said Mansur & Tebbetts Implement Company to said W. E. Dupree in the sum of $22,080.55 and was also indebted to your orator the Washburn & Moen Mfg. Co. for goods, wares and merchandise furnished by said Washburn & Moen Mfg. Co. to said defendant W. E. Dupree in the sum of at least $7789.15.

That on Dec. 3rd, 1895, the said defendant, W. E. Dupree made, executed and authenticated for registration, and deposited for registration as a chattel mortgage with proper officers of the State of Texas, a certain chattel mortgage with the power of sale, by the terms of which he, the said W. E. Dupree, conveyed in trust to the defendant, J. C. Birkhead, the following described property, namely:

All and singular my entire stock of goods, wares and merchandise, lying and situate and being in McLennan County, Texas, in the City of Waco, in the basement and first and second stories of my warehouse heretofore occupied by me as a place of business, and being Nos. 101 to 103 inclusive on the corner of Bridge and First streets, fronting on the North of said Bridge street, it being intended to include hereby all wagons, buggies, machinery, farming implements, sewing machines of every kind, and all harness, vehicles, and each and every item of personal — lying and being in said building. Also all the goods, wares and merchandise, vehicles and personal property of whatever character, and description owned by me and situated in my warehouse located on Bridge street in Waco, Texas, and being No. 123 on said street. Also all my goods, wares, and merchandise and personal property of whatever description, lying and being in my warehouse situate at No. 108 on Bridge Street, in Waco, McLennan County, Texas; also, all my goods, wares and merchandise and personal property of whatever description, lying and being in my warehouse situate at No. 108 on Bridge street in Waco, McLennan County, Tex., also all and singular the goods, wares and merchandise and property lying, situate and being in the back yard of the store house at No. 107 and store house at No. 109, which said store houses are situate on Bridge street in Waco, McLennan County,
Texas. Also all the sewing machines, wagons owned and
114 used by me in carrying on said sewing machine business, most of which are stored in said back yards above named; also all horses and teams and harness used by me in carrying on said sewing machine business and running said wagons; also all horses used by me and all harness and wagons for the purpose of delivering goods from my said warehouse and store houses; also all *that* goods, wares and merchandise and personal property owned by me and situated in my warehouse, being No. 103 on said Bridge street in Waco, Texas;

also all and singular my entire stock of goods, wares and merchandise situated heretofore occupied by me in the town of Rosebud, Falls County, Texas, and in the back yard thereof, including all hardware, implements and vehicles and property of whatever kind and description whatever situated in said warehouse and back yard. Also all and singular my entire stock of hardware, goods, wares, and merchandise and property of whatever kind and description situated in the storehouse occupied by me in said town of Rosebud, in Falls County, Texas, and known as the Weybrand one story brick building. Also all and singular my entire stock of goods, wares and merchandise, including furniture, hardware and every kind or character of goods whatsoever, situated and being in that certain warehouse used and occupied by me in said town of Rosebud, in Falls County, Texas, on Main street, opposite the Gaines Hotel, and being the only warehouse occupied by me in the said town of Rosebud, also one frame warehouse situated in said town of Rosebud, Texas, on Lot No. 9, in Block 18, which said land is leased from J. L. Mitchel by me and said house erected thereon. Also all the horses owned by me in said town of Rosebud, Falls County, Texas, and all harness owned by me therein, and all wagons, including sewing machine wagons, owned by me in said town of Rosebud, which said horses, harness and wagons were used by me in said town of Rosebud in connection with my said business; also all sewing machines situated in said store house and said warehouse. Also all and singular my entire stock of goods, wares and merchandise, including all vehicles, farming implements, hardware, and each and every kind of personal property whatsoever located and situated in that certain two story brick business house situated in the town of Mt. Calm, in Hill Co., Texas, near and adjoining the switch running to said house from the main line of St. Louis & Southwestern Ry. Co., in said town of Mt. Calm, in Hill Co., Texas, being the same warehouse erected by me and heretofore used by me as a business house. Also all the goods, wares and merchandise of every character, kind or description, including vehicles and farming implements situated in the shed and warehouse adjoining said building. Also four head of horses used in connection with the running and operation of said business in said town of Mt. Calm; also all sewing machines in connection with said stock. Also all and singular that entire stock of goods, wares and merchandise lying and being in my storehouse in the town of McGregor in McLennan County, Texas, known as the Boone building. Also all goods, wares and merchandise and property owned by me and situated in the back yard of said building. Also all wagons, horses and teams owned by me and used in carrying on and conducting the sewing machine business at McGregor, and used by me in the delivery of goods sold in said town. Also all sewing machines and all property of whatsoever kind, character or description had and handled by me in carrying on and conducting my said business at the town of McGregor. Also all goods, wares, and merchandise and all property of whatsoever kind or character stored in my warehouse at McGregor, known as the "Old Corrugated Waco Building Association Building" in said town of McGregor; also the following de-

scribed land lying in and being in McLennan County, Texas, and described as follows, to-wit:

1. Lot No. 7, in Block 2, together with the improvements thereon, consisting of one two story brick storehouse, being No. 107 on North 2nd street, in the City of Waco, McLennan Co., Texas, said number being subject to a lien of $1124, with interest accruing thereon.

2. Lot No. 2, in Block 2, in Waco, McLennan Co., Texas, together with the two-story brick storehouse situated thereon, being No. 109 on Bridge street, which property is subject to a lien of $1759.95, and interest accruing thereon; also Lot No. 6, in Block No. 2, situated on Bridge street, in Waco, Texas, together with the improvements thereon, consisting of one two story brick warehouse, being No. 123 on said Bridge street, which property is subject to a lien thereon of $1362, with interest accruing.

That by said conveyance and by the terms thereof the said defendant W. E. Dupree directed the defendant J. C. Birkhead, as trustee, to sell said property conveyed to him by making sales thereof from day to day until all of said property should be disposed of, provided the disposition of all the same was made in four months from the date of said instrument; and further directed that in event any of said property was not disposed of at the expiration of said four months, that then said defendant Birkhead, as trustee, should sell the remainder at public auction for cash, after giving ten days' notice thereof in some newspapers, published in McLennan County, Texas, as regards the personal property, and that the real estate should be sold under the provisions
116 of the laws of Texas regulating sales of that character of property. The said defendant Dupree also by the terms of said instrument, directed and authorized the said Birkhead, as Trustee, out of the proceeds of the sale of said property, to pay certain creditors mentioned in said instrument in accordance with the directions therein contained; that is to say—that first the expenses of administrating said trust should be paid; second, the debt due by said Dupree to defendant, Provident National Bank should be paid; third, those creditors mentioned and described in said instrument as Class A should then be paid in full; fourth, that the remainder of the proceeds of such sales should be devoted then to the payment of those creditors mentioned in Class B of said instrument, in full if possible, and otherwise pro rata according to the amounts of their respective claims; fifth, that those creditors mentioned in Class C of said instrument should be paid in full if possible, and if not, the amount applicable to their payment should be prorated amongst them, according to the amount of their respective claims; and sixth, that the remaining property, if any, in the hands of said trustees, should then be returned by said defendant Birkhead to the defendant, W. E. Dupree; a copy of which said instrument is hereto attached, marked Exhibit A and prayed to be considered in connection with the allegations of this bill.

Your orators further aver that by the terms and provisions of said trust deed, said trustee is directed, after paying the expense

of administration of said trust to pay to the defendant Provident National Bank its said debt of $15,076.80, and interest in full before any money in the hands of said trustee is applied to the payment of any other creditor mentioned in said trust deed.

Your orators further aver that since the making of said trust set forth in Class A of said instrument, including said debt due to Provident National Bank, amounts to the sum of $38,160.14, and your orators aver, on information and believe, and charge, that each and every one of the creditors mentioned and set forth in said Exhibit A have accepted the provisions and terms thereof, and have notified the said defendant Dupree and the said defendant Birkhead of their several respective acceptances.

Your orators further aver that the indebtedness due by the said defendant Dupree to them, respectively, is secured by the terms of said instrument in Exhibit B, and directed by the terms of said instrument to be paid as hereinbefore set forth, in full or pro rata out of the surplus proceeds of sales made by the trustee after the amount of the indebtedness in Exhibit A, and the expenses of administrating said trusts have been fully paid off; and your orators aver that they have each accepted the benefits of said trust deed
117 and have notified the defendants, W. E. Dupree and J. C. Birkhead, of their said acceptances, and they further aver, on information and belief, and each and every one of the above creditors mentioned in said Exhibit B, have also accepted the provision thereof, and have notified the defendants Dupree and Birkhead of their several acceptances.

Your orators further aver that they are informed and believe and charge that the assets and property conveyed by said defendant W. E. Dupree, by the said instrument hereinbefore referred to, to the defendant Birkhead as trustee, for the benefit of the creditors named herein, and amongst others of your orators, will not exceed in value the sum of $65,500.

Your orators further aver that terms and provisions of said trust deed, in respect to the time in which such property must be sold by the defendant Birkhead, are inadequate and insufficient to permit a prudent and fruitful administration of the trust conferred on said defendant Birkhead, because your orators aver, the larger portion of said assets consists of goods, wares and merchandise not now marketable at their fair value, and which cannot be marketed at a fair price, for cash, within the next ensuing 5 months. Your orators further aver that since the making of said trust deed and the delivery of the property mentioned therein by the defendant Dupree to the defendant Birkhead in the administration of said trust inconsistent with the exercises by said Birkhead of sound discretion in the discharge of duties conferred upon him as trustee in said instrument, in this: That the said Dupree is in charge of the offices, books, clerks and employees, ostensibly employed by said trustee; and your orators further aver that they fear the confidential relations existing between the defendants Dupree and Birkhead, as above set forth, will prevent and are prevent-

ing a proper discharge by said Birkhead of his duties as trustee under said instrument.

And your orators further aver that the said defendant Birkhead is a man of small means and not responsible financially and by the terms of said instrument, has not been required to give bond to secure to your orators and the other beneficiary under said trust deed a faithful administration by him of the duties imposed on him as Trustee, and to secure an accounting to the beneficiaries under said trust deed by the said Birkhead of the moneys which will or may come into his hands as trustee under the terms of said instrument.

Your orator- further aver that suits have been instituted by creditors of said Dupree against him, and writs of attachment have been issued therein, and have been levied or have been attempted
118 to be levied upon said stock of goods, not by seizure and appropriation thereof, but by giving notice to the said Birkhead and his employees in charge and custody of the property mentioned in said trust deed; and your orators further aver that writs of garnishments against the defendants, W. E. Dupree, have been sued out in the different Courts in McLennan County, Texas and served on the defendant Birkhead and upon his employees in charge of said assets and property; but your orators are not able to give a more particular description of such suits in which the writs of garnishment and attachment have issued.

Your orators further aver that by reason of the issuance of the said writs of attachment and garnishment and the service thereof and by reason of the different — when the creditors mentioned in said instruments accepted the provisions thereof, controversies have arisen or will arise, as your orators are informed and believe, between attaching and garnishing and accepting creditors of Dupree.

Your orators further aver that the assets and property conveyed in said trust deed are not sufficient in value for the proceeds thereof to pay off the expenses of administering said trust and the debts in Exhibit A of said instrument, and also to pay off and discharge in full debts mentioned and set forth in Exhibit B of said instrument, including the debt of your orator heretofore mentioned; but your orators are informed and believe that said assets will not pay more to your orators and other creditors in Class B than 50 per cent. of their claims.

Your orators further aver that unless restrained by the most gracious writ of injunction the defendant W. E. Dupree and the defendant J. C. Birkhead will, acting together and in concert, take from the property and assets conveyed to the defendant Birkhead by the provisions of said trust deed, a sufficient sum of money to pay off and discharge the debts due by Defendant Dupree to defendant Provident National Bank, hereinbefore set forth, and will cancel and discharge said debt, and the defendant Birkhead will turn over and deliver to the defendant Dupree the said collateral securities which the said defendant Provident National Bank now holds to secure the payment of its said debt; and unless enjoined by the most gracious writ of injunction herein, the said defendant Provident National Bank will deliver up and surrender said collateral to said

defendant Birkhead and the said Dupree, upon payment to it of the amount of indebtedness due by said defendant, W. E. Dupree.

And your orators further aver that, in equity and good conscience, the said defendant bank should be required to marshal the securities held by it and to first exhaust the said collateral
119 held by it by collecting same and applying same toward the liquidation of said debt against the defendant Dupree before participating in a distribution of the funds arising under the terms of said trust deed.

Premises considered, because a court of equity only is able to take cognizance of the matters and things herein set forth, and to afford adequate and proper relief, your orators pray that a writ of injunction issue herein and enjoining and restraining the defendant J. C. Birkhead from using any of proceeds of the property conveyed to him in trust by the defendant W. E. Dupree in paying any part of the indebtedness due by said Dupree to defendant Provident National Bank until the said defendant Provident National Bank has fully and completely exhausted the collateral securities held by it to secure the indebtedness owing to it by the defendant said Dupree, and from paying any money to said defendant Provident National Bank out of the trust funds in his hands until the further order of the Court; and the defendant Provident National Bank be enjoined and restrained until the further hearing of this Court from surrendering to any one the collateral security held by it to secure the payment to it of the indebtedness owing to it by the defendant Dupree, and from exercising any power of sale or from selling or foreclosing upon said collaterals.

And your orators further *pray* that a Receiver be appointed herein to take charge of and administer under the orders of this Court all of the assets and property of every kind conveyed by and mentioned in said trust deed, and hereinbefore specifically set forth, as well as said collateral security hereinbefore mentioned held by the defendant Provident National Bank; and that said property be administered by this Court, and the proceeds thereof be distributed under the order of this Court, and that the Receiver be required to collect the said collateral, and that the same be applied, by the proper orders of this Court, towards the payment of the debts due by the defendant Dupree to the defendant Provident National Bank, and that your orators' claim be established and declared a lien upon the funds in the hands of the receiver, according to the priorities that may be established herein, and that all parties entitled to participate in said fund be required to intervene herein and establish their rights, and the injunctions herein prayed for may be made perpetual; and that your orators have such other and further relief, including costs and attorney's fees, as they may be entitled to in the premises.

And your orators further pray that a writ of subpœna issue herein to be served on the defendant W. E. Dupree commanding him under certain penalty to appear and answer in this be-
120 half, but not under oath, which is hereby expressly waived; and that a writ of subpœna issue out of this Court to be

served on the defendant J. C. Birkhead, requiring him under a certain penalty, to appear and answer herein, but not under oath, answer under oath being hereby expressly waived; and that a writ of subpœna issue herein to be served on the defendant Provident National Bank requiring them to, under certain penalty, appear and answer herein, but not under oath, an answer under oath being hereby expressly waived; and for all such other and further relief in the premises, to which your orators may show themselves entitled.

MANSUR & TEBBETTS IMPLEMENT CO.,
WASHBURN & MOEN MANUFACTURING CO.,
By BAKER, BOTTS, BAKER & LOVETT, AND
McCORMICK & SPENCE,
Their Solicitors.

E. B. PARKER,
J. M. McCORMICK,
Of Counsel.

THE STATE OF TEXAS, *County of McLennan:*

J. C. Duke, first duly sworn, on oath, states that he is the agent of Mansur & Tebbetts Implement Company, and as such has authority to make this affidavit; that he has read over the above and foregoing bill and petition for receiver, and is acquainted with the contents thereof and the matter contained therein, is within his knowledge true, excepts such matters as are averred on information and belief, and as to such he believes them to be true.

J. C. DUKE.

Witness my hand and seal of office this the 5th day of December, 1896.

[SEAL.]

W. B. HAYS,
Notary Public, McLennan County, Texas.

STATE OF TEXAS, *County of McLennan:*

I, George A. Craigin, first duly sworn, on oath, state that he is the agent of Washburn & Moen Manufacturing Company and as such has authority to make this affidavit; that he has read over the above bill and petition for a receiver, and is acquainted with the contents thereof, and that the matter therein contained is, within his knowledge, true, except such matters as are averred on information and belief and as to such he believes them to be true.

(Signed) GEORGE A. CRAIGIN.

121 Witness my hand and seal of office this the 5th day of December, 1896.

[SEAL.]

W. B. HAYS,
Notary Public McLennan County, Texas.

Judgment Appointing Receiver.

Upon exhibition of complainant's bill and Exhibit, and the consideration thereof, it is hereby ordered that the prayer of the bill for the appointment of a receiver be and the same is hereby granted, and Frank F. Finks, Esq., is hereby appointed Receiver of all property described in said bill as well the property conveyed by W. E. Dupree to J. C. Birkhead, Trustee, by chattel mortgage and Deed of Trust executed on December 3rd, 1896, as the property held by defendant National Bank as collateral security, and his bond as receiver is fixed at Twenty-Five Thousand Dollars, with sureties to be approved by a Judge of this Court, and upon the approval of the said bond, the defendant and each of them are ordered to turn over all of said property to the said receiver, who is directed to take possession thereof, preserve it and make an inventory of such property and report to this Court within thirty days what part of the assets in his hands can then be advantageously sold and in the meanwhile make such sales for cash as in his opinion the condition of the property and the market therefor may warrant. It is further ordered that the temporary writ of injunction prayed in the within bill be in accordance with the prayer therefor, upon complainant's filing bond in the sum of Twenty-Five Hundred Dollars, conditioned as required by law with sureties to be approved by the Clerk of this Court. It is *furthered* [ordered] that the defendants or any of them may move to dissolve or modify the injunction herein granted on or before December 10th, 1896, first giving such complainants reasonable notice of such motion.

Done in Chambers this 5th day of December, A. D. 1896.

CHAS. SWAYNE, *Judge.*

(The foregoing has the following indorsement, to-wit:) No. (444) 131 Equity. Mansur & Tebbetts Implement Company and Washburn & Moen Mfg. Co. *vs.* Provident National Bank et al. Original Bill. Filed 12th month, 5th, 1896. Chas. Swayne, Judge. Filed Dec. 5, 1896. J. H. Finks, Clerk. Filed June 5, 1897. J. H. Finks, Clerk, by Chas. H. Ledman, Deputy.

122 EXHIBIT A.

STATE OF TEXAS, *County of McLennan:*

Know all men by these presents that I, W. E. Dupree of McLennan County, Texas, for and in consideration of $10.00 to me in hand paid, and other considerations to me moving, and for and upon the trusts herein named, have bargained, sold and conveyed and delivered unto J. C. Birkhead, Trustee, McLennan County, Texas, all and singular the following described real estate and personal property, to-wit:

1. All and singular my entire stock of goods, wares and merchandise, lying and situate and being in McLennan County Texas, in

the City of Waco, in the basement and first and second stories of my warehouse heretofore occupied by me as a place of business, and being No. 101 to 103 inclusive, on the corner of Bridge and First Street, fronting on north side of said Bridge Street, it being intended hereby to convey and include all wagons, buggies, machinery, farming implements, sewing machines of every kind, and all harness, vehicles, and each and every item of personal property lying and being in said building;

Also all the goods, wares and merchandise, vehicles and personal property of whatever character and description owned by me and situated in my warehouse located on Bridge Street, in Waco, Texas, and being No. 123 on said street.

Also all my goods, wares and merchandise, located, lying and being in my warehouse situate at No. 107 Bridge Street, in Waco, McLennan County, Texas.

Also all my goods, wares and merchandise and personal property of whatever description, lying and being in my warehouse situate at No. 108, on said Bridge Street, in Waco, McLennan County, Texas.

Also all and singular the goods, wares and merchandise and property lying, situate and being in the back yard of the store house, at No. 107, and store house No. 108, which said store houses are situate on said Bridge Street, in Waco, McLennan County, Texas.

Also all the sewing machines, wagons owned and used by me in carrying on and conducting my sewing machine business, most of which are stored in said back yards above named.

Also all horses and teams and harness used by me in carrying on said sewing machine business and running said wagons.

Also all horses used by and all harness and wagons for the purposes of delivering goods from said storehouses and warehouses.

123 Also all that goods, wares and merchandise and personal property owned by and situated in my warehouse, being No. 109 on the said Bridge Street, in Waco, McLennan County, Texas.

Also all and singular my entire stock of goods, wares and merchandise situated heretofore occupied by me in the town of Rosebud, Falls County, Texas, and in the back yard there of, including all hardware, implements and vehicles and property of whatever kind and description whatever, situated in said warehouse and back yard.

Also all and singular my entire stock of hardware, goods, wares and merchandise and property of whatever kind and description situated in the storehouse occupied by me in said town of Rosebud, Falls County, Texas, and known as the "Weybrand" one story brick building.

Also all and singular my entire stock of goods, wares and merchandise, including furniture, hardware and every kind or character of goods whatsoever, situated and being in that certain warehouse used and occupied by me in said town of Rosebud, in Falls County, Texas, on Main Street, opposite the Gaines Hotel, and being the only warehouse occupied by me in said town of Rosebud.

Also one frame warehouse situated in said town of Rosebud, Texas, on Lot No. 9, in Block 18, which said land is leased from J. L. Mitchell by me and said house erected thereon.

Also all the horses owned by me in the said town of Rosebud, Falls County, Texas, and all harness owned by me therein; and all wagons, including sewing machine wagons owned by me in said town of Rosebud, said horses, harness and wagons were used by me in said town in connection with my business; also all sewing machines situated in said town and said warehouse.

Also all and singular my entire stock of goods, wares and merchandise, including all vehicles, farming implements, hardware, and each and every kind of personal property whatsoever, located and situated in that certain two story business house situated in the town of Mount Calm, Hill Co., Texas, near and adjoining a switch running to the said house from the main line of the St. Louis & Southwestern Ry. Co. in said town of Mt. Calm, in Hill Co., Texas, being the same warehouse erected by me and heretofore used by me as a business house.

Also all the goods, wares and merchandise of every character, kind and description, including vehicles and farming implements, situated in the sheds and warerooms adjoining the said building.

Also four head of horses, and all sewing machines and delivery wagons used in connection with the running and operation of
124 the said business in said town of Mt. Calm. Also all sewing machines in connection with said stock.

Also all and singular that entire stock of goods, wares and merchandise, lying and being in my storehouse in the town of McGregor, in McLennan County, Texas, known as the Boone Building. Also all goods, wares and merchandise and property owned by me and situated in the back yard of the said building.

Also all wagons and horses and teams owned and used by me in carrying on and conducting the sewing machine business at McGregor, and used by me in the delivery of goods, sold in said town. Also all sewing machines and property of whatsoever kind, character or description had and handled by me in carrying on and conducting my said business in the town of McGregor. Also all goods, wares and merchandise and all property of whatsoever kind or character stored in my warehouse at McGregor, known as the "Old Corrugated Waco Building Association Building" in said town of McGregor.

Also the following described land lying and being in the McLennan County, Texas, and described as follows, to-wit:

1. Lot No. 7, in Block No. 2, together with the improvements thereon, consisting of one two story brick store house, being No. 107 on North Second Street, in the City of Waco, McLennan County, Texas, said number being subject to a lien of $1,124, with interest accruing thereon.

2. Lot No. 3, in Block No. 2, Waco, McLennan County, Tex., together with the two story brick store house situated thereon, being No. 109 on Bridge Street, which property is subject to a lien of $1759.95 and interest accruing thereon.

Also Lot No. 6, in Block No. 2, situated on Bridge St., in Waco, Texas, together with the improvements thereon, consisting of one two story brick warehouse, being No. 123 on said Bridge Street, which property is subject to a lien thereon $1362.00, with interest accruing.

Said conveyance, however, and delivery of said property is made unto said Birkhead as trustee, in trust, and as a mortgage to secure the payment of the debts herein named for the following purpose and upon the following conditions, to-wit:

1. Said trustee shall take immediate and exclusive possession of all said property, and shall as soon as possible make out and file with the County Clerk of McLennan County, Texas, a full and complete inventory thereof, which said inventory shall be filed as a part of this deed of trust and in connection therewith.

And said trustee shall proceed at once to sell all of said property at retail or in job lots, as to him may seem best for the creditors herein provided for, which sale *sha*ll be made for cash and shall proceed and continue said sale from day to day until all of said property is sold and disposed of by said trustee, said time not to exceed, however, a period of four months. And if said property is not all sold and disposed and converted into cash by said trustee within said period of four months, then and in that event trustee shall sell all of said goods, wares and merchandise at the respective store houses herein above named at a public auction for cash, after giving ten days' notice in some newspaper published in McLennan County, Texas; and to sell said real estate before the County Courthouse door of McLennan County, Texas after giving notice thereof as required by law.

Out of the proceeds of the sales of said property, said trustee shall pay off and satisfy to the respective owners thereof the debts and claims owing by me set out, mentioned and specified in a list or schedule thereof, hereto attached, marked Exhibit A and made a part hereof. If a sufficient amount of money is realized from the sale of said property to pay all of said debts and claims in full, but if the proceeds in full are insufficient to pay all of said claims in full, then and — that event the trustee shall first pay off and satisfy in full the claim of the Provident National Bank of Waco, Texas, and after the payment of said claim in full shall prorate the remainder of the proceeds derived from the sale of said goods and property among the balance of the list of scheduled and claims set out and specified in Exhibit A. It is further provided that as fast as said trustee shall realize cash from the proceeds of the sales of said property in sufficient amount to pay off as much as 10 per cent. of said claim mentioned and specified in said Exhibit A, after the payment of the claim of the said Provident National Bank, said trustee shall distribute said 10 per cent. among the respective claims mentioned and set out in said Exhibit A, paying to each 10 per cent. on the amount of their respective claims. After the payment by the trustee in full of all the claims mentioned in said Exhibit A, if there shall be any money remaining in his hands from the proceeds of the sale of said property, he shall out of such

proceeds, if there be a sufficient amount, pay off and satisfy the claims and debts owing by me mentioned and set out in list thereof marked Exhibit B hereto attached, to the respective parties named therein; and if there be not sufficient money to pay off all of said claims in Exhibit B in full, then said trustee shall pay said
126 claims pro rata; but said claims in Exhibit B shall not be paid until said trustee sells sufficient amount of goods to pay said claims in full, and if the proceeds of said sale are insufficient to pay the said claims in full, then not until he shall be able to sell all of said property conveyed in this trust deed.

After the payment of the claims mentioned in Exhibit A and Exhibit B, as aforesaid in full, if there be any money left remaining in the hands of said trustee from the proceeds of the sales of said property, he shall pay the same to the respective creditors mentioned and set out in Exhibit C hereto attached; if there be a sufficient amount of said money, all of said claims in Exhibit C shall be paid in full; but if the amount of money on hand be insufficient to pay all of said claims in Exhibit C in full, then said trustee shall prorate said amount realized among the several creditors mentioned in and set out in Exhibit C in accordance of the amount of their respective claims. But such distribution is not to be made among the creditors mentioned on Exhibit C until said trustee shall have sold a sufficient amount of goods to pay all the claims mentioned in Exhibit C, or if there be an insufficient amount of money realized from the sale of said goods to pay all of said claims in said Exhibit C in full, then he is not to distribute among the said claimants until all of said property is sold.

If said trustee shall realize from the sale of said property at any time during the continuance of the said trust, a sufficient amount of money to pay all the claims in Exhibit A, Exhibit B and Exhibit C in full, without having sold all the property conveyed to him in this deed of trust, then, and in that event, said trustee shall immediately apply all of said claims in full together with the expenses of executing this trust, including five per cent. commission on the sales made by the trustee as compensation in full to him for acting hereunder.

Said trustee shall have authority to employ all needed assistance to enable him to efficiently sell and dispose of the property herein conveyed, including clerks, bookkeepers, stenographers, salesmen, porters, and all needed labor necessary to enable him to properly carry out the provisions of this trust; and if need be, to employ attorneys or other assistance or help necessary to him in carrying out the provisions of this trust; and to rent storehouses and warehouses, and to secure said property; and the expenses thereof shall first be paid by said trustee out of the proceeds arising from the sales of said property before any of the creditors named in this deed of trust are paid. If at any time during the continuance of this trust, said trustee shall realize from the proceeds of said sale a sufficient amount of money to pay off and satisfy all of said claim in full, he
127 shall immediately pay off and satisfy the same according to their legal tenor and effect, and shall thereupon return all of the property remaining in his hands conveyed to him by this

deed of trust unto me the said W. E. Dupree or to my order. It is not intended hereby to convey any property held by me on consignment.

This conveyance is intended as a mortgage to secure the payment of the respective creditors named in the respective Exhibits attached to said Deed of Trust and I, the said W. E. Dupree, shall pay or satisfy said debts at any time before the complete execution of this trust, then this instrument shall become void and said trustee shall immediately turn over and deliver all the property remaining in his hands unto me, the said W. E. Dupree or to my order.

Witness my — this Dec. 3rd, A. D. 1896.

(Signed) W. E. DUPREE.

STATE OF TEXAS, *County of McLennan:*

Before me the undersigned authority, on this day personally appeared W. E. Dupree, known to me to be the person whose name is subscribed to the above and foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my official seal this the 3rd day of December, A. D. 1906.

W. H. LASTINGER,
Notary Public of McLennan County, Texas.

I hereby accept the trust delegated to me in the above and foregoing deed of trust this the 3rd day of December, A. D. 1896.

J. C. BIRKHEAD.

EXHIBIT A.

	Provident National Bank, Waco, Texas	$15,076.80
	Jas. B. Baker, Waco, Texas	2,266.25
	Jas. B. Baker, Waco, Texas, acct	45.45
	Rosebud Furniture Co., Rosebud, Texas	10,069.80
	B. H. Oats, Mt. Calm, Texas	197.00
	Dockery & Co., Waco, Texas	495.75
	Sanger Bros., Waco, Texas	1,500.00
	Sanger Bros., Waco, Texas	443.66
128	R. T. Dennis & Co., Waco, Texas	800.00
	R. T. Dennis & Co., Waco, Texas	740.45
	Wm. W. Evans, Waco, Texas, notes	3,518.00
	S. W. Slayden, Waco, Texas, notes	4,420.00
	L. Gabert, Waco, Texas, acct	35.00
	C. J. Sturdivant, Waco, Texas	48.75
	W. T. Herrick, Waco, Texas	82.01
	Hill Bros., Waco, Texas	71.30
	Nash-Robinson & Co., Waco, Texas	114.79
	Tom Padgitt, Waco, Texas	17.72
	Pane, Chatham & Co., Waco, Texas	100.02
	J. M. Weybrand, Belton, Texas	66.50
	John T. Battle, Waco, Texas	106.35

Miss Ella Ray, Waco, Texas, salary	536.40
P. A. Johnson, Waco, Texas, salary	598.60
J. J. Pickett, Waco	307.45
J. C. Birkhead, Waco	119.05
W. B. Mays, Waco	30.00
S. I. Bagwel, Waco	160.00
C. P. Shaffer, McGregor	205.00
E. C. Noble, Rosebud	502.50
D. V. Morgan, McGregor	30.00
Geo. Greer, Rosebud	29.00
P. M. Creswell, Mt. Calm	150.00
Hayden Saddlery Co., McGregor, Texas	85.00
E. L. Hensley, Mt. Calm	86.70
R. P. Duke, Rosebud	65.70
E. O. Swofford, Rosebud	30.00
C. F. Smith, Waco	67.85
J. S. McCammey, Waco	116.43
E. E. Thompson, Waco	89.13
Fitzhugh & Motts, Waco	83.10
J. C. Riley & Son, Waco	170.90
E. N. Lynham, Waco	40.00
Hays Bros., Waco	40.60
M. F. Tabb, Waco, Texas	17.20
W. M. Ragland, Waco, Texas	25.00
Hopkinson-Kirksey-Fairchild, Waco	29.16
W. E. Roach, San Antonio, Texas	112.50
Waco Furniture Co.	24.25
Goldstein & Migel, Waco	126.75
Goldstein & Migel, acct	522.72
Prendergast & Evans, Waco	25,000.00
Total Exhibit A	$38,160.14

129 All of the above claims draw interest as provided for in the respective notes and accounts and the interest is hereby secured the same as the principal.

Exhibit B.

Mansur & Tebbetts Implement Co., St. Louis, Mo.	$27,867.55
Mansur & Tebbetts Implement Co., St. Louis, Mo., acct.	213.18
E. L. Green, note	792.00
E. L. Green, acct	9.82
Anderson Mfg. Co., Detroit, Mich., notes	7,551.55
Southern Rock Island Plow Co., Dallas, Texas	2,891.95
Southern Rock Island Plow Co., Dallas, Texas, acct.	68.50
Orchard City Wagon Co., Burlington, Ia.	6,644.65
Orchard City Wagon Co., Burlington, Ia.	39.90
Harvester-King Co., Harvey, Ill.	750.00
Washburn-Moen Manufacturing Co., Houston, Tex.	6,070.80

Washburn-Moen Manufacturing Co., Houston, Texas, acct.	1,708.35
McCormick Harvesting Machine Co., Dallas, Texas	144.01
Sanders Duck & Rubber Co., St. Louis, Mo	125.00
Total Exhibit B	$54,877.79

Exhibit C.

Stoughton Wagon Co., Stoughton, Wis	$6,267.60
Herring Hall Marvin Co., Cincinnati	322.35
Ohio Rake Co., Dayton, O	900.00
Wayne Works, Richmond, Ind	3,826.00
Moore Bros., Nashville, Tenn	331.75
Geo. W. Brown & Co., Galesburg, Ill	890.00
Cincinnati Barb Wire & Fence Co	3,873.65
J. Wald Griswold, Troy, N. Y	1,370.15
Miller Jones Furniture Co., Fort Smith, Ark	151.60
Ballman Cummings Furniture Co	331.70
Harrison Wagon Co., Grand Rapids, Mich	3,877.90
Charter Oak Stove & Range Co., St. Louis, Mo	2,377.10
Geo. Hilsendegan, Detroit, Mich	1,271.80
American Roofing Co., St. Louis, Mo	630.70
W. B. Belknap & Co., Louisville, Ky	2,305.40
130 W. B. Belknap & Co., Louisville, Ky., acct	1,401.52
Warwick Cycle Co., Springfield, Mass	255.00
Warwick Cycle Co., Springfield, Mass., acct	51.00
Pontiac Buggy Co., Pontiac, Mich	2,759.50
White Sewing Machine Co., Cleveland, O	1,497.75
White Sewing Machine Co., Cleveland, O., acct	896.00
J. P. Lowell Arms Co., Boston, Mass	909.70
J. P. Lowell Arms Co., Boston, Mass	229.00
Autin-Tomlinson Manufacturing Co., Jackson, Mich	920.60
Chas. E. Lewis, St. Louis, Mo	194.20
Chas. E. Lewis, St. Louis, Mo	7.50
Rock Hill Buggy Co., Rock Hill, Ill	1,774.50
Thomas Mfg. Co., Springfield, O	1,916.00
Thomas Mfg. Co., Springfield, O	594.00
McLeod-Sparks Fur. Co., Ft. Smith, Ark	259.40
Bell City Mfg. Co., Racine, Wis	252.25
Bell City Mfg. Co., Racine, Wis	60.00
Congress Cycle Co., Hartford City, Ind	44.00
Standard Sewing Machine Co., Cleveland, O	1,319.30
Standard Sewing Machine Co., Cleveland, O., acct	207.24
Eclipse Bicycle Co., Elmira, N. Y	669.50
Whitman & Barnes Mfg. Co., Kansas City, Mo	2,382.00
Whitman & Barnes Mfg. Co., Kansas City, Mo	79.93
Old Dominion Iron & Nail Works, Richmond, Va	937.90
Jamesville Machine Co., Jamesville, Wis	250.00
Jamesville Machine Co., Jamesville, Wis., acct	22.80
Miamasburg Twine & Cordage Co	3,825.00

	O. F. Day & Son, Baltimore, Md.	814.80
	O. F. Day & Son, Baltimore, Md.	395.50
	A. C. Evans Mfg. Co., Springfield, O.	1,025.00
	A. C. Evans Mfg. Co., Springfield, O., acct.	560.00
	Emerson-Fisher Co., Cincinnati, O.	1,450.75
	Emerson-Fisher Co., Cincinnati, O., acct.	15.00
	Texas-Moline Plow Co., Dallas, Tex.	3,780.80
	Texas-Moline Plow Co., Dallas, Texas, acct.	100.86
	Eagle Mfs. Co., Kansas, Mo.	1,207.15
	Eclipse Hay Press Co., Kansas City, Mo.	1,167.50
	Eclipse Hay Press Co., Kansas City, Mo.	17.23
	Curd-Sinton Mfg. Co., Louisville, Ky.	820.50
	Columbia Carriage Co., Hamilton, O.	2,454.90
	Evansville Stove Works, Evansville, Ind., acct.	1,278.40
	Evansville Stove Works, Evansville, Ind.	6.25
	Duffy-Trowbridge Stove Mfg. Co., Hannibal, Mo.	1,145.55
131	Bymel Carriage Co., St. Marys, O.	2,443.50
	I. L. Ellwood Mfg. Co., Dekalb, Ill.	2,238.65
	Gale Mfg. Co., Albia, Mich.	2,977.20
	J. I. Case Plow Works, Racine, Wis.	2,188.30
	J. I. Case Plow Works, Racine, Wis., acct.	2,029.13
	McFarland Carriage Co., Connersville, Ind.	1,660.00
	H. Cultivator Co., Connersville, Ind.	2,291.10
	E. Bement & Sons, Lansing, Mich.	1,667.55
	E. Bement & Sons, Lansing, Mich., acct.	84.97
	Victor Buggy Co., Cincinnati, O.	1,526.20
	Haish Mfg. Co., Dekalb, Ill.	1,057.90
	Haish Mfg. Co., Dekalb, Ill., acct.	1,334.91
	Aultmann-Miler Co., Aiken, O.	1,026.50
	Florence Wagon Co.	2,636.90
	U. S. Wind Engine & Pump Co., Batavia, Ill.	1,518.25
	Acme Harvester Co., Quincy, Ill.	50.00
	Marshall Fur. Co., Henderson, Ky.	155.75
	Leggett & Platt, Carthage, Mo., acct.	54.00
	Independent Whip Co., Westfield, Mass.	75.68
	B. F. Avery & Sons, Dallas, Texas	142.50
	Gulf Bag Co., New Orleans, La.	323.79
	Hilbard, Spencer, Bartlett & Co., Chicago, Ill.	3,658.35
	Standard Harness Co., Seymour, Ind.	151.85
	Acme Safe Co., Chattanooga, Tenn.	57.20
	Marietta Safe Co., Marietta, Ga.	81.83
	W. S. Milne, Cleveland, Tenn.	26.95
	J. Leopold & Co., Baltimore, Md.	812.60
	Englke Saddlery Co., Cincinnati, O.	530.66
	Lumis & Hart, Chattanooga, Tenn.	521.15
	L. Kiper & Sons, Chicago, Ill.	547.00
	Ft. Smith Chair Co., Ft. Smith, Ark.	70.10
	St. Louis Coffin Co., St. Louis, Mo.	201.00
	J. H. Neustedt & Co., St. Louis, Mo.	39.42
	Mo. Glass Co., St. Louis, Mo.	39.42
	Nashville Whip Co., Westville, Mass.	62.60

	Jasper Fur. Co., Jasper, Ind.	180.00
	Swin Burner Vapor Stove Co., St. Louis, Mo.	39.42
	Crane Co., Kansas City	876.44
	Ellwood Wire & Nail Co., DeKalb, Ill.	1,147.94
	Waters-Pierce Oil Co., Dallas, Texas	154.61
	Cahill-Swift & Co., St. Louis, Mo.	98.22
	May Mfg. Co., Elmyria, O.	570.00
	Toledo Meral Wheel Co., Toledo, Ohio	299.00
	August Gast Bank Note & Lith. Co., St. Louis, Mo.	112.67
	Continental Wire Co.	444.35
132	Scanlon & Co., Louisville, Ky.	802.67
	Minte Co., New Orleans, La.	238.80
	Ralph Temple Cycle Co., Chicago, Ill.	539.00
	Hanna Wagon Co., Peoria, Ill.	945.00
	National Sewing Machine Co., Belverde, Ill.	151.60
	American Dunlap Tire Co., N. Y.	3.34
	Hilton Collins, Louisville, Ky.	314.50
	Evansville Mattress & Lounge Factory, Evansville, Ind	100.75
	Heinsbaugh Bor., Jamestown, N. Y.	26.10
	DeCamp Levoy Co., Cincinnati, O.	679.84
	Price Bros., Evansville, Ind.	127.15
	Mo. Tent & Awning Co., St. Louis, Mo.	45.35
	Wm. Reed & Son, Boston, Mass.	812.81
	Beunah Chair Co., Evansville, Ind.	263.65
	Rubleman Lucas Hardware Co., St. Louis, Mo.	62.61
	Joliet Reed & Ratan Co., Joliet, Ill.	117.10
	National Lead Co., St. Louis, Mo.	1.200.00
	Economist Plow Co., South Bend, Ind.	5.85
	B. F. Goodrich Co., Akron, O.	3.38
	Akron China Co., Akron, O.	204.46
	Mechanics Fur. Co., Rockford, Ill.	55.42
	J. B. Weber Moulding Co., St. Louis, Mo.	168.06
	Henry Nurre, Cincinnati, O.	268.56
	Gendron Wheel Co., Toledo, O.	219.32
	Drey & Kuhn, St. Louis, Mo.	61.39
	Meyer, Bannerman & Co.	1,188.86
	Simmons Hardware Co., St. Louis, Mo.	1,376.25
	Morgan & Wright, Chicago	115.80
	Judkins Co., Chicago	179.20
	Specialty Fur. Co., Evansville, Ind.	118.80
	Veal Bros., Mich., Ind.	130.26
	Troy Chair Co., Troy, Ind.	162.75
	Stolz Schmidt Fur. Co., Evansville, Ind.	311.50
	Paris Fur. Co., Evansville, Ind.	57.15
	C. H. Hanson, Chicago	6.00
	Mfg. & Merchandise Warehouse, Chicago	65.63
	Mermod-Jaccard & Co., St. Louis, Mo.	662.10
	R. Chester Frost & Co., Chicago	500.00
	Moore & Evans, Chicago	535.00
	Total Exhibit C	$118,574.05

133 *Original Bill of Complaint of W. B. Belknap & Co.*

Filed December 9th, 1896.

In Circuit Court of the United States for the Northern District of Texas, at Waco. In Equity.

UNITED STATES OF AMERICA, *Northern District of Texas:*

To the Honorable Judges of said Court:

W. B. Belknap & Company, a private corporation, organized under the laws of the State of Kentucky and having its office and place of business and domicile in the City of Louisville in said State, of which W. B. Belknap is President and J. D. Price is Secretary, bring this their bill against W. E. Dupree of Waco, Texas, a citizen of Texas and an inhabitant of the Northern District of Texas, and against J. C. Birkhead of Waco, Texas, a citizen of Texas and inhabitant of the Northern District of Texas, and against the Provident National Bank, a private corporation organized under the laws of the United States, domiciled at Waco, Texas, and an inhabitant of said Northern District, and against S. W. Slayden, a citizen of Texas and a resident of the Northern District of Texas, and against the Rosebud Furniture Company, a partnership, the members of which partnership your orator has been unable to ascertain and discover, but who it is informed and believes to be W. E. Dupree, P. C. Tarver and I. Loony, who reside in the town of Rosebud and State of Texas, and are inhabitants of the Northern District of Texas, and Mollie E. Dupree, wife of W. E. Dupree, who resides in Waco, Texas, and is an inhabitant of the Northern District of Texas, and against James B. Baker, a citizen of the State of Texas, who resides in the Northern District of Texas, and humbly complaining unto your Honors, your orators aver that the said W. E. Dupree for a number of years prior to the 3rd day of December, 1896, was engaged in business in the City of Waco, in the County of McLennan and State of Texas, and in the City of Mount Calm, in the State of Texas, and the City of McGregor in the State of Texas, and in the City of Rosebud and State of Texas, carrying on and conducting a large wholesale and retail business, consisting of the buying and selling of machinery, farming implements, hardware, wagons, buggies, barbwire, queensware, furniture, bicycles, and a large assortment of similar goods. That said

134 W. E. Dupree had prior to the 3rd day of December, 1896, accumulated in said City of Waco a very large amount of said merchandise as he dealt in as aforesaid, amounting to the value of approximately $50,000.00 and had prior to the 3rd day of December, 1896, accumulated in the town of Mt. Calm, Texas, another stock of such goods amounting in value, as your orator is informed and believes, to the sum of $18,000.00, and had also accumulated a stock of like character in the town of Rosebud, Texas, amounting in value, as your orator is informed and believes, to about the sum of $15,000.00; and another stock of such goods prior to said date, in the town of McGregor, Texas, amounting in value, as your orator is in-

formed and believes, to the sum of $8,000.00; that said stock of goods, wares and merchandise aforesaid were bought by said defendant Dupree entirely on the credit, and in addition to the goods that said Dupree had on hand on December 3rd, 1896, said defendant Dupree had, prior to said date, sold a very large amount of goods of the above described class and character, amounting in value, as your orator is informed and believes, to the sum of $150,000.00, for all of which said goods said defendant Dupree, received from said purchasers thereof negotiable promissory notes to the amount of $150,000.00, as aforesaid in payment thereof, and that the said goods were converted by the said Dupree in promissory notes as aforesaid, as your orator is informed and believes, also purchased by W. E. Dupre on credit, and your orator is informed and believes, and avers that said W. E. Dupree has never paid for said goods sold by him as aforesaid, or if he has paid for any of them, then the part so paid was small in amount, and also entire value of said goods so sold is now owing by said Dupree to his creditors and among other creditors, to your orator. That during the conduct of his business for the past several years, the defendant J. C. Birkhead has been the confidential clerk of the said defendant, W. E. Dupree, working for said defendant Dupree on a salary and entirely in the confidence of the said W. E. Dupree, and under his dominion and exclusive control, and that said defendant Birkhead has not during said term of this employment with said Dupree, had or conducted any independent business of his own, but has habitually and only acted in the business of said employment as confidential clerk of said defendant Dupree. Your orators aver on information and belief that preparation as to the execution of the deed of trust hereinafter mentioned and in contemplation of his insolvency and for the purpose of defrauding his creditors, among whom was your orator, and that said defendant, W. E. Dupree, had fraudulently and covertly conveyed to the said Birkhead a large amount

135 of property, both real and personal, certified copies of two deeds to which are hereto attached and marked Exhibits A and B for identification, and other real property which your orator cannot now accurately describe; which said property, both real and personal, is now being held by said defendant Birkhead in his own name and under apparent ownership by him, but that said property, both real and personal, is held by defendant Birkhead, acting in collusion and fraud, which defendant Dupree, for the real benefit of the defendant W. E. Dupree. That prior to the third day of December, 1896, defendant W. E. Dupree made, executed and delivered to the defendant Provident National Bank, and to defendant S. W. Slayden, his certain promissory notes in writing payable to said Bank and to said defendant Slayden, amounting in the aggregate to the sum of $15,076.86 and to the sum of $4,420.00, and prior to said date the said W. E. Dupree, defendant, respectively delivered to the defendants, Provident National Bank, and the defendant S. W. Slayden, collateral securities for the better securing of said promissory notes, consisting as your orator is informed and believes, of negotiable promissory notes made by farmers and other persons, and other evidences of indebtedness derived by said defendant, Dupree, from the opera-

tion of his business as aforesaid, and notes realized from the fraudulent sale of real estate in fraud of his creditors, one of whom is your orator; and that on the 3rd day of December, 1896, the said Provident National Bank held said collateral securities, a more complete description of which your orator is not able to obtain and to give unto the Court, to secure the payment of the indebtedness evidenced by said promissory notes executed by said defendant Provident National Bank and said defendant Slayden as aforesaid, now hold said notes of defendant Dupre as aforesaid and also the collateral notes and other securities deposited by said defendant Dupree with said defendant Provident National Bank and defendant S. W. Slayden to secure his said indebtedness with them respectively and that by virtue of contract between defendant W. E. Dupree and defendant Provident National Bank, and a contract with defendant S. W. Slayden, the said Provident National Bank and said S. W. Slayden have full and complete right to collect said collateral security and appropriate the proceeds to the payment, liquidation and discharge of the said indebtedness owing by said Dupree to said Bank and said Slayden respectively. And your orator avers that said collateral security are entire- collectable and afford adequate and complete security to said defendants Provident National Bank and said deft. Slayden,
out of which to enforce the collection of said indebtedness
136 owing by the said defendant W. E. Dupree to the said bank
and said Slayden as aforesaid. Your orator further avers that prior to said 3rd day of December, 1896, defendant W. E. Dupree was indebted to Jas. B. Baker of Waco, Texas, in the sum of $2,266.25, which said indebtedness was evidenced by a certain promissory note for said amount which had been delivered to said defendant, James B. Baker, and that prior to said date said defendant W. E. Dupree had given to said Baker collateral securities in order to secure the payment of said indebtedness, of which securities your orators cannot give a complete description. And your orators aver that said James B. Baker now hold- said collateral securities given to him by said W. E. Dupree to secure the indebtedness of the said Dupree to the said James B. Baker, and that the said defendant, Jas. B. Baker has full and complete control of said collateral security, and has the right to collect it and appropriate the proceeds thereof to the payment, liquidation and discharge of the said indebtedness owing by the said Dupree to the said Jas. B. Baker. And our (your) orator further avers on information and belief that said collateral security is entirely collectable and furnishes adequate and complete security to said defendant Baker, out of which to enforce the collection of the indebtedness owing him by the said defendant, W. E. Dupree. Your orator further avers, on information and belief, that said defendant, W. E. Dupree, is a member of the partnership known as the Rosebud Furniture Co. and owns a greater portion of the stock in said furniture Co. though his name as a member does not appear therein, and that prior to the 3rd day of Dec., 1896, that said defendant executed to said Rosebud Furniture Co. his certain promissory notes for the sum of $1,069.80 to said Rosebud Furniture Co. and delivered said notes to said Furniture Company without receiving a valuable consideration

therefor and that said notes were delivered and executed in fraud of the creditors of the said W. E. Dupree, one of whom is your orator. Your orator further avers on information and belief that prior to the 3rd day of Dec., 1896, that defendant, W. E. Dupree, transferred and delivered to his wife, Mollie E. Dupree, a certain vendor's lien note for the sum of $1,124.00, being on Lot 7, in Block 2, together with the improvements thereon, consisting of one two story brick house, said property being known as No. 107 on N. 2nd Street in the City of Waco, McLennan County, Texas, which said vendor's lien note was transferred without any consideration at all, and that the same had been paid off and satisfied in full by the defendant, W. E. Dupree, and that said note was so delivered to defendant, Mollie E. Dupree, for the purpose of defrauding his creditors,

137 and placing said property beyond their reach in that same was subject to a valid and subsisting lien. Your orator further avers that prior to the 3rd day of December, 1896, said Dupree was indebted to your orator herein in the sum of $3,706.92 for goods, wares and merchandise furnished by your orator to said W. E. Dupree. That on said Dec. 3rd, 1896, said defendant W. E. Dupree made, executed authenticated for registration and deposited for registration, as a chattel mortgage with the proper officer of the State of Texas, a certain chattel mortgage with the power of sale by the terms of which mortgage, said W. E. Dupree conveyed to the defendant, J. C. Birkhead, in trust the following described property, viz—

1. All and singular my entire stock of goods, wares and merchandise, lying and situate and being in McLennan County, Texas, in the City of Waco, in the basement and first and second stories of my warehouse heretofore occupied by me as a place of business, and being No. 101 to 103 inclusive, on the corner of Bridge and First Streets, fronting on the north side of said Bridge Street, it being intended hereby to convey and include all wagons, buggies, machinery, farming implements, sewing machines of every kind, and all harness, vehicles, and each and every item of personal property lying and being in said building.

Also all the goods, wares and merchandise, vehicles and personal property of whatever character and description owned by me and situated in my warehouse located on Bridge Street, in Waco, Texas, and being No. 123 on said street.

Also all my goods, wares, and merchandise, located, lying and being in my warehouse situated at No. 107 Bridge Street, in Waco, McLennan County, Texas.

Also all my goods, wares and merchandise and personal property of whatever description, lying and being in my warehouse situated at No. 108, on said Bridge Street, in Waco, McLennan County, Texas.

Also all and singular the goods, wares and merchandise and property lying, situated and being in the back yard of the store house at No. 107 and store house No. 108, which said store houses are situated on said Bridge Street in Waco, McLennan County, Texas.

Also all the sewing machines, wagons owned and used by me in carrying on and conducting my sewing machine business, most of which are stored in said back yards above named.

Also all horses and teams and harness used by me in carrying on said sewing machine business and running said wagons.

138 Also all horses used by and all harness and wagons for the purposes of delivering goods from said store houses and warehouses.

Also all that goods, wares and merchandise and personal property owned by and situated in my warehouse, being No. 109 on the said Bridge Street, in Waco, McLennan County, Texas.

Also all and singular my entire stock of goods, wares and merchandise situated heretofore occupied by me in the town of Rosebud, Falls County, Texas, and in the back yard thereof, including all hardware, implements and vehicles and property of whatever kind and description whatever, situated in said warehouse and back yard.

Also all and singular my entire stock of hardware, goods wares and merchandise and property of whatever kind and description situated in the store house occupied by me in said town of Rosebud, Falls County, Texas, and known as the "Weybrand" one story brick building.

Also all and singular my entire stock of goods, wares and merchandise, including furniture, hardware and every kind or character of goods whatsoever, situated and being in that certain warehouse used and occupied by me in said town of Rosebud in Falls County, Texas, on Main Street, opposite the Gaines Hotel, and being the only warehouse occupied by me in said town of Rosebud.

Also one frame warehouse situated in said town of Rosebud, Texas, on Lot No. 9, in Block 18, which said land is leased from J. L. Mitchell by me and said house erected thereon.

Also all the horses owned by me in the said town of Rosebud, Falls County, Texas, and all harness owned by me therein; and all wagons, including sewing machine wagons owned by me in said town of Rosebud, said horses, harness and wagons were used by me in said town in connection with my business; also all sewing machines situated in said town and said warehouse.

Also all and singular my entire stock of goods, wares and merchandise, including all vehicles, farming implements, hardware, and each and every kind of personal property whatsoever, located and situated in that certain two story business house situated in the town of Mount Calm, Hill Co., Texas, near and adjoining a switch running to the said house from the main line of the St Louis & Southwestern Ry. Co. in said town of Mt. Calm in Hill Co., Texas, being the same warehouses erected by me and heretofore used by me as a business house.

Also all the goods, wares and merchandise of every character, kind and description, including vehicles and farming implements,

139 situated in the sheds and warerooms adjoining the said building.

Also four head of horses, and all sewing machines and delivery wagons used in connection with the running and operation of the said business in said town of Mt. Calm. Also all sewing machines in connection with said stock.

Also all and singular that entire stock of goods, wares and mer-

chandise lying and being in my storehouse in the town of McGregor, in McLennan County, Texas, known as the Boone Building. Also all goods, wares and merchandise and property owned by me and situated in the back yard of the said building.

Also all wagons and horses and teams owned and used by me in carrying on and conducting the sewing machine business at McGregor, and used by me in the delivery of goods, sold in said town. Also all sewing machines and property of whatsoever kind, character or description had and handled by me in carrying on and conducting my said business in the town of McGregor. Also all goods, wares and merchandise and all property of whatsoever kind or character stored in my warehouse at McGregor, known as the "Old Corrugated Waco Building Association Building," in said town of McGregor.

Also the following described land lying and being in *the* McLennan County, Texas, and described as follows, to-wit:

1. Lot No. 7, in Block No. 2, together with the improvements thereon, consisting of one two story brick storehouse, being No. 107 on North 2nd Street, in the City of Waco, McLennan County, Texas, said number being subject to a lien of $1,124, with interest accruing thereon.

2. Lot No. 3, in Block No. 2, Waco, McLennan County, Texas, together with the two story brick storehouse situated thereon, being No. 109 on Bridge Street, which property is subjected to a lien of $1759.95 and interest accruing thereon.

Also Lot No. 6, in Block No. 2, situated on Bridge Street, in Waco, Texas, together with the improvements thereon, consisting — one two story brick warehouse, being No. 123 on said Bridge Street, which property is subject to a lien thereon, $1362.00, with interest accruing, that by the said conveyance and by the terms thereof the said defendant W. E. Dupree directed the defendant J. C. Birkhead, as Trustee, to take immediate possession and control of all said property in said instrument contained and described and to sell the said prop-
140 erty conveyed as aforesaid by making sales thereof from day to day until all of said property shall be disposed of, provided the disposition of all of said property was made within four months from date of said instrument, and further directed that in event any of said property was not disposed of at the expiration of said four months, that then said defendant Birkhead, as Trustee, should sell the remainder at public auction for cash, after giving ten days' notice thereof in some newspaper in McLennan County, Texas, as regards personal property, and that the real estate should be sold under the provisions of the laws of Texas regulating sales of that character of property. The said defendant, Dupree, also by the terms of said instrument directed and authorized defendant Birkhead, as Trustee, out of the proceeds of the sale of said property to pay certain creditors mentioned in said instrument, a copy of which is hereto attached and marked Exhibit B for identification in accordance with the directions therein contained; that is, first, expenses of administering said trust should be paid, second, the debts due by said defendant Dupree to the defendant Provident National Bank should be paid; third, those creditors mentioned and described in said instrument in Class A, in

which class was said defendant Jas. B. Baker, Rosebud Furniture Co. and defendant S. W. Slayden, should then be paid in full; fourth, that the remainder of the proceeds of such sale should be devoted then to the payment of those creditors mentioned in Class B of said instrument in full if possible, and otherwise pro rata according to the amount of their respective claims; fifth, that those creditors mentioned in Class C of said instrument should be paid in full if possible, and if not, the amounts applicable to their payment should be prorated amongst them according to their respective claims, and that the remaining property, if any, in the hands of said trustee should then be returned by said defendant Birkhead to defendant Dupree. Your orator further avers that by the terms and provisions *for* said deed of trust, said trustee is directed, after paying the expenses of administration of said deed of trust, to pay to the defendant, the Provident National Bank, its said debt of $15,076.80 and interest in full before any money in the hands of said trustee is applied to the payment of any other creditors mentioned in said deed of trust. Your orator further avers that the total amount of indebtedness set forth in Class A in which list of indebtedness is included that of Provident National Bank, amounting to $15,076.80, and that of defendant S. W. Slayden, amounting to $4,420.00, and that of defendant James B. Baker, amounting to the sum of $2,266.25, and that of de-

141 fendant the Rosebud Furniture Co., amounting to the sum of $1,069.80, all of which said indebtedness in Class A amounts to *in* the total sum of $38,160.14. Your orator further avers on information and belief and charges that each and every one of the said creditors set forth in the said Exhibit A have accepted the terms and provisions of the said trust deed and have notified defendant W. E. Dupree and said defendant Birkhead of their several and respective acceptances. Your orator further avers that the indebtedness due by the said defendant Dupree is secured by the terms of said instrument in Exhibit C, and is directed by the terms of said instrument to be paid as hereinbefore set forth in full or pro rata out of the surplus proceeds of the sales made by the trustee, after the amount of the indebtedness in Exhibit A and expenses of administering said deed of trust and the indebtedness have been fully paid off and satisfied. And your orator avers that they have accepted the benefit of said deed of trust and have notified the defendant W. E. Dupree and J. C. Birkhead of their said acceptances, and your orator further avers on information and belief that each and every one of said creditors who are to be paid before your orator is to receive anything, have also accepted the provisions of said trust deed and have notified the defendants, W. E. Dupree and J. C. Birkhead, of their acceptances. Your orator further avers on information and belief and also charges that the assets and property conveyed by the defendant, W. E. Dupree, by the said instrument hereinbefore referred to, to, the defendant J. C. Birkhead as Trustee for the benefit of the creditors named therein, amongst others your orators, will not exceed in value the sum of $100,000.00. Your orator further avers that the terms and provisions of said trust deed in respect to the time within which said property must be sold by the defendant Birkhead is inadequate and

insufficient to permit a prudent and fruitful administration of the trust conferred upon said defendant Birkhead, because your orator avers, the larger proportion of the assets, consisting of goods, wares and merchandise, are not now marketable at the fair value and cannot be marketed for a fair price for cash within the next ensuing four months. Your orator further avers that since the making of said deed of trust, and the delivery of the property mentioned therein by the defendant Dupree to the defendant Birkhead, the said defendant Dupree has been exercising and is now exercising dominion and control over the acts of the said Birkhead in the administration of said trust inconsistent with the exercise by the said Birkhead of sound discretion in the discharge of the duties conferred upon him in said instrument, in this, that the said Dupree is virtually in control
142 of the offices, books, clerks and employees ostensibly employed by the said Trustee and is also in control of the goods, wares and merchandise conveyed to said Birkhead in trust as aforesaid. And your orator further avers that it fears the confidential relation of Birkhead as above set forth will prevent and are preventing a proper discharge by the said defendant, Birkhead, of his duties as trustee under the said instrument. Your orator further avers that said defendant Birkhead is a man of small means and is not responsible financially to any large amount and by the terms of said instrument has not been required to give any bond whatsoever to secure your orator and the other beneficiaries under said trust deed for the faithful and true administration by him of the duties thereof imposed on him as Trustee and to insure an accounting to the beneficiaries under said trust deed by the said defendant Birkhead of the moneys which will or may come into his hands as trustee under the terms of said instrument as aforesaid. Your orator further avers that numerous suits have been instituted by the creditors of said defendant Dupree against him, and a great many writs of attachment and other processes have been issued in said cause and have been levied or attempted to be levied upon said stocks of merchandise goods and wares transferred by said Dupree to said J. C. Birkhead not by seizure and appropriation thereof, but by giving notice to the said Birkhead and his employees in charge and custody of the said property mentioned in said trust deed. And your orator further avers that writs of garnishment against the defendant, W. E. Dupree, have been sued in the different Courts of McLennan County and served upon the defendant, Birkhead, and upon his employees in charge of said assets and property, but your orator is not able to give a more particular description of such suits in which writs of garnishment and attachment above mentioned have issued. Your orator further avers that by reason of the said writs of garnishment and attachment and the service thereof, and by reason of the different dates when the creditors mentioned in said instrument accepted the provisions thereof, controversies have arisen and will arise, as your orator is informed and believes, between the attaching and garnishing creditors and the accepting creditors of the said defendant. Your orator further avers that the assets and property conveyed in said trust deed are not sufficient in value for the proceeds thereof to

pay off the expenses of administering said deed of trust and debts in Exhibit A of said instrument and also to pay off and discharge in full the debts mentioned and set forth in Exhibit B of said
143 instrument and then to pay off and satisfy in full the debts mentioned in Class C of said instrument, including the debt of your orator heretofore mentioned but your orator is informed and believe- that said assets will not pay to your orator and other creditors mentioned in Class C any greater amount than twenty-five per cent. of their claims. Your orator further avers that unless restrained by this Court's most gracious writ of injunction the defendant-, W. E. Dupree and J. C. Birkhead, acting together in concert in fraud upon the rights of your orator and the other creditors mentioned in said instrument — take from the assets and property conveyed to the said defendant Birkhead by the provisions of said trust deed sufficient sum of money to pay off and discharge the debt due by the defendant Dupree to defendants, Provident National Bank, and defendant, S. W. Slayden, hereinbefore set forth and will cancel and discharge said debts due them respectively and that defendant Birkhead will turn over and deliver to the defendant Dupree the said collateral security which said Provident National Bank and defendant S. W. Slayden now hold to secure the payment of their said respective debts, and unless enjoined by the most gracious writ of injunction herein, the said defendant, Provident National Bank and defendant S. W. Slayden wil- deliver up and surrender said collateral to said Birkhead and to said Dupree upon payment to them of the amounts of the indebtedness due them respectively by the defendant W. E. Dupree. Your orator further avers that unless restrained by this Court's most gracious writ of injunction the defendant Dupree and the defendant Birkhead, acting together and in concert, will, in fraud of your orator's rights, take from the assets and property conveyed to defendant Birkhead as aforesaid a sufficient sum of money to pay off and discharge the debt due by defendant Dupree to defendant Jas. B. Baker, hereinbefore set forth, and will cancel and discharge said debt, and defendant Birkhead will turn over and deliver to defendant Dupree the said collateral security of the defendant Jas. B. Baker, which said Jas. B. Baker now holds, to secure the payment of his said debt, and unless enjoined by this Court's most gracious writ of injunction herein said Jas. B. Baker will give up and surrender his collaterals to the said defendants Birkhead and Dupree, upon payment to him of the amount of indebtedness due him by said defendant Dupree and that said defendant Birkhead and said defendant Dupree will, acting together and in concert, take from the assets and property conveyed to the defendant Birkhead by the provisions of said trust deed a sufficient sum of money to pay off and discharge the debt due by defendant to the defendant, Rosebud Furniture Co., hereinbe-
144 fore set forth, and will cancel and discharge said debt, and as your orator has hereinbefore alleged, it avers on information and belief that said sum so taken from the assets aforesaid, will not as a matter of fact be turned over to said Rosebud Furniture Co. at all, but will be turned over to said defendant W. E. Dupree by said J. C. Birkhead, and unless enjoined by this Court's most gracious writ of injunction the said defendant, Rosebud Furniture Co. or de-

fendant Dupree will be paid — fraud of the rights of your orator and other creditors mentioned in said deed of trust the said amount of the indebtedness owing the said Rosebud Furniture Co. as aforesaid. And your orator further avers that in equity and good conscience the said defendant bank and defendant S. W. Slayden and defendant Jas. B. Baker shall be required to marshall the securities held by them respectively and to first exhaust the collateral by collecting same and applying same toward the liquidation of their indebtedness against the defendant, W. E. Dupree, before participating in the transfer of the funds arising under the terms of the said deed of trust. Your orator further avers on information and belief that the said vendor's lien notes now held by the defendant, Mollie E. Dupree, is held in fraud of the rights of your orator and the other creditors mentioned in said deed of trust and cast- a shadow or cloud upon the property conveyed in said trust deed as aforesaid, against which said vendor's lien note was held, and your orator, believing that said vendor's lien note had been paid and satisfied in full, now asks this Court to cancel the said vendor's lien note held by the defendant, Mollie E. Dupree, as aforesaid, and hold the same for naught. Your orator further asks that said defendant, J. C. Birkhead, be restrained and enjoined by this Court's most gracious writ of injunction from paying to the defendant, Rosebud Furniture Co., the indebtedness due and owing to them by the defendant, W. E. Dupree, as aforesaid, because your orator believes the said indebtedness to be fictitious and made and delivered in fraud of the rights of your orator, and the other creditors mentioned in said deed of trust. Your orator further says and avers that prior to Dec. 3rd, 1896, and on said date the defendant, W. E. Dupree, had and was using, in the conduct of his business certain books of account and record in the transaction of the said business, which said books of account and record were a part of and parcel of said business, and that by the terms of said trust deed defendant Dupree did not turn over to the trustee as afore-said any of said books of account or record in order that said trustee might collect all of said accounts that were due and owing by the
145 creditors of the said defendant Dupree and used said sums of money which were due and owing as aforesaid in the payment of the amount of indebtedness due and owing to each of the creditors mentioned — the trust deed hereinbefore named. Your orator further avers that said defendant Dupree in said deed of trust did convey to said defendant Birkhead the safe and office fixtures used by him in his business, and your orator on information and belief avers that said office fixtures are necessary for the conduct of said business by the said trustee Birkhead, and charges and avers that in said safe are contained a large amount of personal assets of defendant Dupree, which said defendant refuses to turn over to said trustee and which are now being held in fraud of your orator and the other creditors mentioned in said trust deed hereinbefore mentioned by said defendant Dupree and that said personal property should be turned over to said trustee as part of the assets of defendant Dupree, to be used in paying off the claims of creditors mentioned in said deed of trust.

Premises considered, because a court of equity only, is able to take cognizance of the matters and things herein set forth and to

afford adequate and proper relief, your orator prays that writ of injunction issue herein enjoining and restraining the defendant, J. C. Birkhead, from using any of the proceeds of the property conveyed to him in trust by the defendant, W. E. Dupree, and paying any of the indebtedness due by said Dupree to the Provident National Bank or to defendant, S. W. Slayden, or defendant Jas. B. Baker, until said defendant, Provident National Bank, said defendant, S. W. Slayden, and said Jas. B. Baker have fully and completely exhausted the collateral securities held by them respectively to secure their indebtedness owing to them respectively by said Dupree, and from paying any money to said Provident National Bank, to defendant, S. W. Slayden, and defendant, Jas. B. Baker, or defendant, Rosebud Furniture Co. out of the trust funds in his hands until the further order of this Court, and that defendant, Mollie E. Dupree, be enjoined and restrained until further order of this Court from surrendering or conveying to any one the certain vendor's lien notes hereinbefore mentioned held by her in fraud of the rights of your orator and other creditors, and that the defendants, Provident National Bank, S. W. Slayden and Jas. B. Baker be enjoined and restrained until the further order of this Court from surrendering to any one the collateral securities held by them respectively to secure the payment to them of the indebtedness owing to them by defendant, W. E. Dupree, and from exercising
146 any power of sale or foreclosing any of the collateral held by them as aforesaid. And your orator further prays that a Receiver be appointed herein to take charge of and administer under the order of this Court all of the assets and property of every kind or character whatsoever conveyed by and mentioned in said deed of trust hereinbefore mentioned and hereinbefore specifically set forth, as well as said collateral hereinbefore mentioned held by defendant Provident National Bank and defendant S. W. Slayden and defendant Jas. B. Baker, and such other securities as are now held by the defendant, W. E. Dupree in fraud for the purpose of defrauding your orator and the other creditors mentioned in said deed of trust of a part of the assets of the said W. E. Dupree in the payment of the indebtedness due them as set — specifically and enumerated in said deed of trust hereinbefore mentioned and referred to, and that all of said property be administered by this Court and the proceeds thereof be distributed under the orders of this Court, and the Receiver herein appointed be required to collect the said collaterals and all notes and accounts turned over to him and other personal property turned over to him by the said W. E. Dupree under order of this Court and the same be applied by proper order of this Court to the payment of the debt due by the defendant Dupree to the Provident National Bank, S. W. Slayden and Jas. B. Baker and that your orator's claim be declared and established as a lien upon the fund in the hands of the receiver according to the priority as may be established herein, and that all parties entitled to participate in said funds be required to intervene herein and establish their rights thereto and that the injunctions herein prayed for may be made perpetual, and your orator further prays that the

appointment of a Receiver in Equity cause No. 131 now pending in this Court wherein Mansur & Tebbetts Implement Co. *et al.* are plaintiffs and Provident National Bank *et al.* are defendants be made permanent, and also that the books of account and record and safe now situated in the office of the said defendant, W. E. Dupree, in the City of Waco, in the second story of the building situated at the corner of Bridge and First Streets, known as No. 101 Bridge Street, Waco, Texas, and the safe and personal property contained in said safe, and that defendant W. E. Dupree be compelled by order of this Court to open said safe and turn over the contents thereof to said receiver appointed as aforesaid and that said property be administered by this Court and the proceeds thereof be distributed under the orders of this Court as aforesaid; and that on a hearing hereof to make the appointment of a Receiver appointed as aforesaid
147 permanent. Your orator prays that this cause shall be consolidated with Equity cause No. 131 now pending in this Court, and for such other and further relief, including costs and attorneys' fees, as they may show themselves entitled to in the premises. And your orator further prays that a writ of subpœna issue herein and be served on defendant W. E. Dupree, commanding him under a certain penalty to appear and answer in this behalf, but not under oath, which is hereby expressly waived, and that writ of subpœna issue out of this Court to said defendant, Birkhead, requiring him under a certain penalty to appear and answer in this behalf, but not under oath, which is hereby expressly waived, and that writs of subpœna issue herein to be served on the defendant Provident National Bank and defendant S. W. Slayden, respectively, requiring them under a certain penalty to appear and answer herein, but not under oath, and answer under oath being hereby expressly waived, and that a writ of subpœna issue herein and be served on defendant, Jas. B. Baker, requiring him under a certain penalty to appear and answer herein, but not under oath, an answer under oath being hereby expressly waived, and that a writ of subpœna issue herein to be served on the defendant Rosebud Furniture Co., a firm composed of W. E. Dupree, E. C. Tarver and I. Looney, requiring them under a certain penalty to appear and answer herein, but not under oath, an answer under oath being expressly waived hereby, and that a writ of subpœna issue herein to be served on the defendant, Mollie E. Dupree, requiring her under certain penalty to appear and answer herein, but not under oath, an answer under oath being hereby expressly waived, and all such further relief in the premises to which your orator may show itself entitled.

W. B. BELKNAP & COMPANY,
By JAMES D. WILLIAMSON,
Its Solicitor.

STATE OF TEXAS, *County of McLennan:*

A. T. Connaly, first being duly sworn, on oath deposes and says that he is the agent of W. B. Belknap & Company, and as such agent, has the authority to make this affidavit, and that he has read over the above and foregoing bill and petition for a Receiver and

is acquainted with the contents thereof and that the matters therein contained are within his knowledge true except *as* such matters of fact as are averred on information and belief and these he believes to be true.

R. L. CONNALLY,
By CHAS. H. LEDNUM, *Deputy.*

148 Sworn to and subscribed to before me this 8th day of December, A. D. 1896.

[SEAL.]

JAMES I. MOORE,
Notary Public, McLennan County, Texas.

(The foregoing has the following indorsement, to-wit: (444) No. 132 Eq. W. B. Belknap & Company *vs.* Provident Nat. Bank *et al.* Bill in Equity. Filed Dec. 9th, 1896. J. H. Finks, Clerk. By C. A. Richardson, Deputy. Filed June 5th, 1897. J. H. Finks, clerk; by Chas. H. Lednum, deputy.

Deed from W. E. Dupree, to J. C. Birkhead, heretofore printed at page 77.

* * * * * * *

STATE OF TEXAS, *County of McLennan:*

I, T. H. Brown, Clerk of the County Court and *Ex-Officio* Recorder of McLennan County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a certain deed from W. E. Dupree to J. C. Birkhead as the same appears on file in the County Clerk's office of McLennan County.

In testimony whereof and to certify I hereunto sign my name officially and affix the seal of said County Court at my office in the City of Waco, on this 7th day of Dec., 1896.

[SEAL.]

T. H. BROWN,
Clerk of County Court and Ex-Officio Recorder of McLennan Co., Texas.

STATE OF TEXAS, *County of McLennan:*

Know all men by these presents that I, W. E. Dupree, of McLennan County, State of Texas, for and in consideration of $100 cash to me in hand paid by J. C. Birkhead of the County of McLennan, State of Texas, and the further consideration of ten promissory notes of even date with this deed for $100 each and bearing 10 per cent. interest from date. The first note being payable April 24, 1897, and one every five months thereafter until all of said notes are paid. These notes also provided for 10 per cent. att'y's fees in case of legal proceedings. A vendor's lien is hereby retained on the property hereby conveyed to secure payment of same, have granted, bargained, sold and conveyed, and by these presents
149 do grant, bargain, sell and convey unto the said J. C. Birkhead all that piece or parcel of land situate, lying and being

in the County of McLennan, State of Texas, and City of Waco, and described as follows:

Lot No. 11, in Block No. 58, of University Heights addition to Waco, Texas, as per plat recorded in Book 65 of page 613 of McLennan County deed records. Being same property sold to me by J. H. Mackey by deed recorded in book 105, page 603, McLennan county, deed records, to which deed and the record thereof reference is here made for further description, together with all the rights, members, hereditaments and appurtenances to the same belonging to have and to hold all and singular the premises above mentioned unto the said J. C. Birkhead his heirs and assigns forever; and I do hereby bind myself, my heirs, my executors and administrators to warrant and forever defend all and singular the said premises unto the said J. C. Birkhead, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand and seal this 24th day of November, A. D. 1896.

(Signed) W. E. DUPREE.

STATE OF TEXAS, *County of McLennan:*

Before me, W. A. Cassady of McLennan County, Texas, on this day personally appeared W. E. Dupree, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 24th day of Nov., A. D. 1896.

[NOTARY SEAL.] W. A. CASSADAY,
Notary Public, McLennan County, Texas.

Filed for record 3 day of Dec., 1896, at 11:55 A. M. Recorded 5 day of Dec., 1896, at 8 o'clock A. M.

T. H. BROWN, *Clerk.*
By CHAS. E. MOORE, *Deputy.*

STATE OF TEXAS, *County of McLennan:*

I, T. H. Brown, Clerk of the County Court and *Ex-Officio* Recorder of McLennan County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a certain deed from W. E. Dupree to J. C. Birkhead, as the same appears of
150 record in Book 108, pages 331, one of the Deed Records of McLennan County.

In testimony whereof, and to certify which, I hereunto sign my name officially and affix the seal of said County Court at my office in the City of Waco, this 7th day of Dec., A. D. 1896.

[SEAL.] T. H. BROWN,
Clerk of County Court and Ex-Officio Recorder, McLennan County, Texas.
By J. M. VAUGHAN,
Deputy Clerk.

Order on Bill.

Filed December 9th, 1896.

Upon the exhibition of complainant's bill and exhibits and the consideration thereof in Chambers, it hereby is ordered that the prayer of the bill for the appointment of a Receiver be and it is hereby granted, and that Frank F. Finks, *ordered that the prayer of the bill for the appointment of a Reiceiver be and it is hereby granted, and that Frank F. Finks*, Esq., who was appointed Receiver in Equity Cause 131, wherein Mansur & Tebbetts *et al.* are plaintiffs and Provident National Bank *et al.* are defendants, is hereby appointed Receiver of all properties described in this bill, as well as the properties conveyed by W. E. Dupree to J. C. Birkhead, Trustee, by chattel mortgage executed on December 3rd, 1896, and the property held by defendant Provident National Bank as collateral security and the property held by S. W. Slayden, defendant, as collateral security and the property held by James B. Baker, defendant, as collateral security.

And it further appearing to the Court that the said Receiver has had his bond fixed at $25,00.00 and that his said bond has been made with good and sufficient sureties thereon, and the same has been approved by this Court, it is hereby ordered that said Receiver be not required to give further bond in this cause. The defendants and each of them are hereby ordered to turn over to said Receiver all of said property to the said Receiver, who is directed to take possession thereof, preserve it and make an inventory of such property and report to this Court within thirty days what part of the assets then in his hands can be advantageously sold, and in the meanwhile make such sales for cash as in his opinion the condition of the property and the market therefor may warrant.

It is further ordered that temporary writs of injunction prayed for in the within bill issue in accordance with the prayer
151 therefor upon complainant's filing bond in the sum of One Thousand Dollars, conditioned as required by law with sureties to be approved by the Clerk of this Court.

It is further ordered that the defendants or any of them may move to dissolve or modify the injunctions herein granted on or before December 10th, 1896, first giving complainant reasonable notice of such motion.

It is further ordered that on such trial that this cause be consolidated with Equity Cause 131 now pending in this Court.

Done in Chambers this 9th day of December, 1896.

CHAS. SWAYNE.

The foregoing has the following indorsement, to-wit: 444. 132 Eq. W. B. Belknap & Co. *vs.* Provident National Bank *et al.* Order on Bill Filed Dec. 9, 1896. J. H. Finks, Clerk. Filed June 5, 1897. J. H. Finks, Clerk, by Chas. H. Lednum, Deputy.

Order Authorizing Interventions.

Filed December 12th, 1896.

131. Equity.

MANSUR & TEBBETTS IMPLEMENT CO. and WASHBURN & MOEN MFG. COMPANY
vs.
PROVIDENT NATIONAL BANK ET AL.

SATURDAY, *December 12th*, 1896.

Upon further consideration of the Court of the original bill filed in this cause, it is ordered that all persons, who are interested in the matters and things, or who deem themselves so interested, shall have and are hereby granted leave to intervene herein, without further leave or order of this Court until otherwise directed, subject to exception.

CHAS. SWAYNE, *Judge*.

The foregoing has the following indorsement, to-wit: 444. No. 131 Eq. Mansur & Tebbetts Implement Co. *et al. vs.* Provident National Bank *et al.* Order authorizing interventions. Filed Dec. 12th, 1896. J. H. Finks, Clerk. By C. A. Richardson, Deputy. Filed June 5, 1897. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

152 *Order Referring Interventions to Special Master.*

Filed December 18th, 1896.

No. 131. Equity.

MANSUR & TEBBETTS IMP. CO., WASHBURN & MOEN MFG. CO.
vs.
PROVIDENT NATIONAL BANK ET AL.

It is ordered by the Court that all interventions which are or may be filed in this cause be and same are hereby, as of course and without further order, referred to A. S. Lathrop, Esq., the duly appointed Standing Master of this Court; and said Master shall proceed to the consideration and hearing of said interventions and the issues therein in accordance with the rules and practice in such cases, and make due report thereon to this Court and the Clerk will immediately furnish to the said Master an authentic copy of this order.

Done at Waco, Texas, December 18th, 1896.

CHAS. SWAYNE, *Judge*.

The foregoing has the following indorsement, to-wit: 444. No. 131 Eq. Mansur & Tebbetts Imp. Co. and Washburn & Moen Mfg. Co. *vs.* Provident National Bank *et al.* Order referring all interventions to the Standing Master. Filed Dec. 18th, 1896. J. H. Finks, Clerk. Filed June 5, 1897. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

153 *Original Answer of S. W. Slayden.*

Filed January 30th, 1897.

In the Circuit Court of the United States for the Northern District of Texas, at Waco.

No. 132. In Equity.

W. E. Belknap & Co.
vs.
Provident National Bank et al.,

Consolidated with

No. 131. In Equity.

Mansur & Tebbetts Imp. Co. and Washburn & Moen Mfg. Co.
vs.
Provident National Bank et al.

The Answer of S. W. Slayden, One of the Defendants in the Above Named Plaintiff's Bill of Complaint Filed Dec. 9, 1896.

In answer to said bill, I, S. W. Slayden, say as follows:

1st. I know nothing concerning the charges made in said bill wherein W. E. Dupree is charged with the purchase of a large amount of goods on credit prior to Dec. 3, 1896, nor of the intimate relationship of the defendants Dupree and J. C. Birkhead, nor of the transfer of any property by said W. E. Dupree to J. C. Birkhead prior to said date in fraud of creditors or otherwise, nor of the possession of any collateral held by any of the other defendants in said bill to secure their debts.

2nd. I aver that it is not true as charged in said bill that I have collateral given me by said W. E. Dupree to secure my debt and do now aver that neither on the 3rd of December, A. D. 1896, nor before that day, nor since that day, have I had any collateral belonging to said W. E. Dupree, nor did I have on said date any security for my debts against W. E. Dupree except a vendor's lien as hereinafter shown and the lien given W. E. Dupree on said December 3rd, 1896, by the execution and delivery of the chattel mortgage or deed of trust to J. C. Birkhead.

3rd. I aver that it is true that on December 3rd, 1896, the said

Dupree executed the chattel mortgage or deed of trust in about the terms as stated in said bill of complaint and that I accepted
154 said deed of trust in so much as it gave me additional security for my debt against said Dupree.

4th. I aver it to be a fact that on December 3rd, 1896, W. E. Dupree was indebted to me, and for which indebtedness I held his four promissory notes as follows: Each for the sum of nine hundred dollars, dated December 31st, 1894, due in January first of years 1897, 1898, 1899 and 1900, respectively, bearing interest at the rate of eight per cent. per annum, payable annually and providing for the payment of ten per cent. attorney's fees if placed in hand of an attorney for collection, that all of said notes were given for part of the purchase money for an undivided half interest in Lot 1, Block No. 2, City of Waco, McLennan County, Texas, and was secured by vendor's lien expressly retained in deed conveying said property to W. E. Dupree. That on December 3rd, 1896, the interest had been paid on all of said notes up to January 1st, 1896, and that on said date these notes with accrued interest and attorney's fees represented all the debts due me by W. E. Dupree. That since the execution of said deed of trust, on to-wit, January 11, 1897, the said W. E. Dupree has caused one of said notes to be paid in full together with the interest on the other three notes up to January 1st, 1897.

5th. I know nothing of the other matters complained of in said bill.

Wherefore I ask that the injunction issued herein be dissolved and that I be allowed my costs and further that my debt still due by said W. E. Dupree be established as a charge on the property in the hands of the Receiver in this cause in accordance with the terms of said deed of trust.

(Signed) S. W. SLAYDEN.
M. C. H. PARK,
Solicitor for S. W. Slayden.

STATE OF COLORADO, *County of Arapahoe:*

S. W. Slayden, being duly sworn, deposes and says: I am the above named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts of deeds of any other person or persons, I believe to be true.

S. W. SLAYDEN.

155 Sworn to before me this 26th day of January, 1897. My commission expires Sept. 6th, 1897.

[SEAL.] JOHN H. LEIPER,
Notary Public, Arapahoe County, Colorado.

The foregoing has the following indorsement: 444. No. 132 and 131 Equity. W. B. Belknap & Co. *vs.* Provident Nat'l Bank *et al.* Mansur & Tebbetts Implement Co. and Washburn & Moen Mfg. Co. *vs.* Provident Nat'l Bank *et al.* Original answer of S. W.

Slayden. Filed January 30th, 1897. J. H. Finks, Clerk. Filed Jany. 5th, 1897. J. H. Finks, Clerk. By Chas. H. Ledbum, Deputy.

Order as to Filing Interventions.

Filed March 9th, 1897.

In the United States Circuit Court for the Northern District of Texas, at Waco.

MANSUR & TEBBETTS IMPLEMENT COMPANY ET AL.
vs.
W. E. DUPDEE ET AL.

It appearing to the Court, sitting in Chambers, that all of the personal property in the hands of the Receiver of the estate of W. E. Dupree has been sold, and that the proceeds are ready for distribution among those entitled thereto and that it is desirable that such distribution should be made with as little delay as possible, it is ordered, adjudged and decreed by the Court that all persons having or claiming any interest in such proceeds be and they are hereby required to propound such claims by intervention in this cause, pending at Waco, on or before the Rule Day in April next, and that any or all claims in or to such proceeds, or any part thereof, not propounded on before the day aforesaid, shall, by reason thereof be barred and forever precluded from participating in the distribution of the same, and all of such proceeds shall be distributed among those persons propounding their claims as aforesaid, according to their respective rights and priorities and no other.

It is further ordered by the Court that all interventions filed as aforesaid, shall disclose under oath, all payments, credits, offsets and discounts that should be allowed thereon, together with a
156 full and complete description of any and all security, collateral or otherwise, that the intervener may have for his claim, or any part thereof.

It is further ordered that the interventions filed as aforesaid shall be and the same are hereby referred to the standing Master for investigation and report, and the Master shall file his report on the law and the facts on all of such interventions on or before the Rule Day in May next.

It is further ordered that the Receiver give notice of the aforesaid orders by publishing a true copy thereof in some daily newspaper published in the City of Waco, for six consecutive days next succeeding the filing hereof at Waco.

Done in Chambers at the City of Fort Worth on this the 8th day of March, 1897.

CHAS. SWAYNE,
U. S. District Judge.

The foregoing has the following indorsement, to-wit: 131 and 132 Eq. 444. Mansur & Tebbetts Imp Co. *et al. vs.* Provident Nat'l Bank *et al.* Order as to filing interventions. Filed Mar. 9, 1897. J. H. Finks, Clerk. By C. A. Richardson, Deputy.

Answer of Respondents.

Filed April 3rd, 1897.

In U. S. Circuit Court for the Northern District of Texas, at Waco.

In Equity. No. 132.

W. B. BELKNAP & CO.
vs.
PROVIDENT NATIONAL BANK ET AL.

Now comes W. E. Dupree and M. E. Dupree, respondents in the above styled and numbered cause, and demur to plaintiff's petition filed in this cause and say the allegations and averments therein contained are insufficient to maintain a cause of action, and of this they pray the judgment of the Court.

Answering, if required, these defendants deny all and singular the allegations and averments contained — complainant's bill of complaint and of this they put themselves upon the country.

Specially answering herein the defendant W. E. Dupree says that there is no such a partnership in existence, as that alleged by com-
plainants consisting of W. E. Dupree, T. C. Tarver and J.
157 Loony, under the name of Rosebud Furniture Company, and this respondent shows to the Court that he is not a member of any such partnership firm and was not at the time or prior to the institution of this suit, all of which he stands ready to verify.

PREDNDERGAST & EVANS,
Attorneys for Defendants.

STATE OF TEXAS, *County of McLennan:*

Sworn to and subscribed before me by W. E. Dupree on this the 3rd day of April, A. D. 1897.

[SEAL.] J. T. HARRISON,
Notary Public, McLennan County, Texas.

The foregoing has the following indorsement, to-wit:
444 Nos. 131 & 132. W. B. Belknap & Co. *vs.* Provident Nat. Bank, *et al.* Answer of respondents. Filed April 3, 1897. J. H. Finks clerk; by C. A. Richardson. Filed June 5, 1897. J. H. Finks, clerk; by Chas. H. Lednum, deputy.

No. 100. S. W. SLAYDEN, Intervener.)

Judge Swayne says without making formal order, the Master will consider the reference on the answer that the defendant filed in Case No. 131 and 132 Equity by S. W. Slayden, and the order asked by him on the Rule Day April 5, 1897, in connection with his plea of intervention.

COMPLAINANTS: While the intervener is preferred in Class A we want to be subrogated if he is paid out of the fund.

Intervener offers in evidence a note dated Waco, Texas, December 31st, 1894, for $900, payable Jan. 1st, 1898.

Intervener calls the attention of the Court to the reading of clause in regard to attorneys fees. Said coupon is to bear interest at the rate of 10 per cent. per annum after maturity, with 10 per cent. on the whole amount herein unpaid for attorney's fees, besides the Court costs if the holder thereof has to sue, or to go into the Probate Court or other Court in respect hereof.

Intervener offers in evidence a note dated Waco, Texas, December 31st, 1894, for $900 due January 1st, 1899, with two interest coupons due respectively the first of January, 1898, and 1st of January, 1899.

158 Intervener offers in evidence a note dated Waco, Texas, December 31st, 1894, for $900 payable January 1st, 1900, with three interest coupons attached.

Intervener offers in evidence a certified copy of deed from O. Bailey to W. E. Dupree (see next attached).

Deed from O. Bailey, to W. E. Dupree. Heretofore printed at page 73.

* * * * * * *

Filed for record Jany. 21st, 1895, at 2:20 o'clock P. M.
Recorded 4th day of Feb., 1895, at 3:30 o'clock P. M.

STATE OF TEXAS, *County of McLennan:*

I, Joney Jones, and ex-officio Recorder of McLennan County, Texas, hereby certify that the above and foregoing is a true and correct copy of a certain deed from O. Bailey to W. E. Dupuree as the same appears of record in Book 99, page 390, one of the deed records of McLennan County.

In testimony whereof and to certify which I hereunto sign my name officially and affix the seal of said County Court at my office in the City of Waco, this 13 day of April, 1897.

[SEAL.] JONEY JONES,
Clerk County Court and Ex-Officio Recorder
McLennan County, Texas.
[SEAL.] By R. B. BANTON,
Deputy Clerk.

W. E. DUPREE, a witness for the intervener, testified as follows:

Q. State to the Court whether or not Mr. Slayden accepted to you under the deed of trust?
A. Yes sir.
Q. At what time?
A. On the morning of the fourth.
Q. What time?
A. About 9 or 10 o'clock; I don't remember the exact time; but early.
Q. It was before 10 o'clock?
A. I think it was between 9 and 10, about 9 or 10, it was not later than 10.
159 Q. It was not after Mr. Sleeper was down there.
A. It was before Mr. Sleeper's garnishment was run.

Order Transferring Cause to Dallas.

Filed May 13th, 1897.

In the U. S. Circuit Court for the Northern District of Texas, at Waco.

Numbers in Equity Consolidated.

MANSUR & TEBBETTS CO. ET AL., Complainants,
vs.
W. E. DUPREE ET AL., Defendants.

Upon consideration of complainant's motion herein filed to transfer, the record in this cause to that branch of this Court sitting — Dallas, and it appearing that such transfer will be for the interest of all parties to the above controversy, it is hereby ordered and decreed that this cause be and the same is hereby transferred to the branch of this Court sitting at Dallas, Texas, and the Clerk of this Court is hereby ordered to transmit the record herein to Dallas, and also to transmit to Dallas any papers which may be filed herein, as soon as the same are filed.

May 13th, 1897.

CHAS. SWAYNE,
U. S. District Judge.

The foregoing has the following indorsement, to-wit: 441. In Equity No. 131 and 132. Order transferring cause to Dallas. Filed May 13, 1897. J. H. Finks, Clerk. By C. A. Richardson, Deputy.

160 *Final Decree.*

No. 131. Equity. Dallas. No. 444. Equity.

MANSUR & TEBBETTS IMPLEMENT CO. and WASHBURN & MOEN MFG. CO.
vs.
PROVIDENT NATIONAL BANK ET AL.

and

No. 132. Equity.

W. B. BELKNAP & COMPANY
vs.
PROVIDENT NATIONAL BANK ET AL.

This cause coming on to be heard on this the 26th day of June, 1897, upon the bills, answers, pleas of intervention, Master's Report and exceptions thereto, and the evidence and was argued by counsel and on consideration thereof it is ordered, adjudged and decreed by the court that the Master's report upon the intervention of McLeod & Sparks Co. be and the same hereby is confirmed and that the McLeod & Sparks Co. recover nothing by reason of their intervention herein, and that complainants recover against said McLeod & Sparks Company all costs by reason of its intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the Master's report on the plea of intervention of the Simmons Hardware Co. be and the same hereby is confirmed and approved and that the said Simmons Hardware Co. take nothing on its said plea of intervention and that complainants herein recover against said Simmons Hardware Company all costs by reason of its intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the Master's report on the intervention of the Engelke Saddlery Co. be and the same is hereby approved and confirmed and that the said Engelke Saddlery Co. take nothing by its intervention herein and that complainants recover against the said Engelke Saddlery Company all costs by its said intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the plea of intervention of the United States Wind, Engine and Pump Company, be and the same is hereby approved and confirmed and that the said United States Wind, Engine and Pump Company take nothing by its plea of intervention, and that complainants recover against the United States Wind,
161 Engine and Pump Company all costs by its intervention herein incurred, for which let execution issue.

It [is] further ordered, adjudged and decreed by the Court that

the master's report on the intervention of Ellwood Wire & Nail Company be and the same is hereby approved and confirmed and that the said Ellwood Wire & Nail Company take nothing by its plea of intervention, and that complainants recover of the said Ellwood Wire & Nail Company all costs by said intervention herein incurred for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the plea of intervention of the Cincinnati Barbed Wire & Fence Company be and the same is hereby approved and confirmed and that said Cincinnati Barbed Wire and Fence Company take nothing by its plea of intervention and that complainants herein recover of the Cincinnati Barbed Wire and Fence Company all costs by reason of its intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the plea of intervention of Scanlan & Co. be and the same hereby is approved and confirmed and that Scanlan & Co. take nothing by reason of their intervention and that complainant recover of said Scanlan & Co. all costs by reason of their intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of The Ohio Rake Company be and the same hereby is approved and confirmed and that the said Ohio Rake Company take nothing by its said plea of intervention, and that complainants recover from said Ohio Rake Company all costs by reason of its intervention herein incurred, for which let execution [issue].

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Miamsburg Twine and Cordage Company be and the same hereby is approved and confirmed and that the said Miamisburg Twine and Cordage Company take nothing by reason of their intervention and that complainants recover — the said Miamisburg Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that master's report on the intervention of DeCamp-LeVoy & Company be and the same hereby is approved and confirmed and that the said DeCamp-LeVoy & Company take nothing by its said plea of intervention and that the complainants recover of the said DeCamp-LeVoy & Company all costs by reason of its intervention herein incurred; for which let execution issue.

162 It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of The Texas-Moline Plow Company be and the same hereby is approved and confirmed and that the said Texas-Moline Plow Company take nothing by its plea of intervention and that the complainants recover of the Texas-Moline Plow Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the National Lead Company be and hereby is approved and confirmed and that the said

National Lead Company take nothing by reason of its intervention and that the complainants recover of the said National Lead Company all costs by reason of its intervention incurred herein, for which let execution issue.

It [is] further ordered, adjudged and decreed by the Court that the master's report on the intervention of Meyer-Bannerman & Co. be and the same hereby is approved and confirmed and that Meyer-Bannerman & Co. take nothing by reason of their intervention and that the exceptions of said Meyer-Bannerman & Co. to said master's report be and the same are hereby overruled and that complainants herein recover of the said Meyer-Bannerman & Co. all costs by reason of its intervention herein incurred, for which let execution issue, to which action of the Court in overruling their exceptions to the master's report herein, the said Meyer-Bannerman & Co. excepted in open Court and gave notice of appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of The Hanna Wagon Company be and the same hereby is approved and confirmed and that the said Hanna Wagon Company take nothing by reason of its intervention and that complainants herein recover of the said Hanna Wagon Company all costs of its intervention in this behalf, incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the report of the master herein on the intervention of the Ralph Temple Cycle Company be and the same is hereby approved and confirmed and that the said Ralph Temple Cycle Company take nothing by reason of its intervention herein and that complainants recover of the Ralph Temple Cycle Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Missouri Glass Company be and the same hereby is approved and confirmed and that the said Missouri Glass Company take nothing by reason of its said plea of intervention and that the compainants herein recover of
163 the said Missouri Glass Company all costs by reason of its intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the claim of Stoltz-Schmidt Furniture Company be and the same hereby is approved and confirmed and that the said Stolz-Schmidt Furniture Company taking nothing by reason of its intervention herein and that complainants herein recover of the said Stoltz-Schmidt Furniture Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Crane Company be and the same is hereby approved and confirmed and that the said Crane Company take nothing by reason of its intervention herein and that complainants recover of the said Crane Company all costs in its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Harrison Wagon Com-

pany be and the same is hereby approved and confirmed and it is further ordered that the said Harrison Wagon Company take nothing by reason of its intervention and that complainants recover of the said Harrison Wagon Company all costs by reason of its said intervention incurred herein, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Wayne Works be and the same hereby is approved and confirmed and that the said Wayne Works take nothing by reason of their intervention herein and that complainants herein recover of the said Wayne Works all costs by reason of its said intervention incurred herein, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the J. R. Weber Moulding Company be and the same hereby is approved and confirmed and that the said J. R. Weber Moulding Company take nothing by reason of its intervention herein and that the complainants recover of the said J. R. Weber Moulding Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the Old Dominion Iron and Nail Company be and same hereby is approved and confirmed and that the said Old Dominion Iron and Nail Company take nothing by reason of its intervention herein and that complainants herein recover
164 from the Old Dominion Iron and Nail Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Geo. W. Brown & Co. be and the same hereby is approved and confirmed and that said Geo. W. Brown & Co. take nothing by reason of their intervention herein and that complainants recover of the said Geo. W. Brown & Co. all costs by reason of their said intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of L. Kiper & Sons be and the same hereby is approved and confirmed and that said L. Kipper & Sons take nothing by reason of their intervention herein and that complainants recover of the said L. Kipper & Sons all costs by reason of their said intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Thomas Manufacturing Company be and the same hereby is approved and confirmed and that the said Thomas Manufacturing Company take nothing by reason of its intervention herein and that the complainants recover of the said Thomas Manufacturing Company all costs by reason of its said intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Fay Manufacturing Company be and the same hereby is approved and confirmed and that

the said Fay Manufacturing Company take nothing by reason of its said intervention herein and that complainant herein recover of the said Fay Manufacturing Company all costs by reason of its said intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Austin-Tomlinson & Webster Manufacturing Company be and the same is hereby approved and confirmed and that said Austin, Tomlinson & Webster Manufacturing Company take nothing by reason of its plea of intervention herein and that the complainants herein have and recover of the said Austin, Tomlinson & Webster Manufacturing Company all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of A. C. Evans Manufac-
165 turing Company be and the same hereby is approved and confirmed and that the said A. C. Evans Manufacturing Company — by reason of its intervention herein and that complainants recover from the said A. C. Evans Manufacturing Company all costs by reason of its intervention incurred herein, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of I. L. Elwood Manufacturing Company be and the same hereby is approved and confirmed and that the said I. L. Elwood Manufacturing Company take nothing by reason of its intervention herein and that the complainants recover of the said I. L. Elwood Manufacturing Company all costs by reason of its said intervention incurred herein, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the J. I. Case Plow Works be and the same hereby is approved and confirmed and that the said J. I. Case Plow Works take nothing by reason of its intervention herein and that the complainants recover of the said J. I. Case Plow Works all costs by reason of its intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Charter Oak Stove and Range Company be and the same hereby is approved and confirmed and the said Charter Oak Stove and Range Company take nothing by reason of its intervention therein and that complainants recover of said Charter Oak Stove and Range Company all costs by reason of its intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the plea of intervention of W. B. Belknap & Co. be and same is hereby approved and confirmed and that the said W. B. Belknap & Co. take nothing by reason of their original bill and by reason of their plea of intervention therein and that complainants recover of the said W. B. Belknap & Co. all costs by reason of the intervention herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. W. Evans, Master No. 84,

be and same hereby is approved and confirmed and that said W. W. Evans take nothing by reason of his intervention herein, Master's No. 84, and that the complainants recover of the said W. W. Evans all costs herein by reason of said intervention, Master's No. 84, for which let execution issue.

166 It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. W. Evans, Master's No. 85, be and the same is hereby approved and confirmed and that the said W. W. Evans take nothing by reason of his said intervention, Master's No. 85, and that the complainants herein recover of W. W. Evans all costs herein incurred by reason of the said intervention, Master's No. 85, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the City of Waco be and same is hereby approved and confirmed and that the said City of Waco take nothing by reason of its intervention herein and that the complainants herein recover of the said City of Waco all costs by reason of its said intervention incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of G. W. Clark be and the same hereby is approved and confirmed and that the said G. W. Clark take nothing by reason of his said intervention herein and that complainants recover of said G. W. Clark all costs incurred herein by reason of his intervention, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Fitzhugh & Motts be and the same hereby is approved and confirmed and that the said Fitzhugh & Motts take nothing by reason of their intervention herein and that complainants recover of said Fitzhugh & Motts all costs incurred by reason of their said intervention, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Continental Wire Company be and the same is overruled and set aside and that the said Continental Wire Company have and recover out of the funds of the registry of the Court the sum of One Hundred and Sixty-five Dollars and Fifty Cents and all costs by it in this behalf incurred, for the payment of which it shall have a lien of said funds of equal dignity with the Toledo Metal Wheel Company, and prior in right to any other party herein.

It is further ordered, adjudged and decreed by the Court that the report of the master on the intervention of the Toledo Metal Wheel Company be and the same is hereby overruled and that the said Toledo Metal Wheel Company have and recover out of the funds in the registry of the Court in this case the sum of One Hundred and Twenty-one Dollars and Twenty-five cents, and all costs by it in this behalf incurred, for the payment of which it is hereby ad-

167 judged a lien of said fund of equal dignity with the Continental Wire Company interveners, and prior in right to any other party herein.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. M. Wybrants be and

the same hereby is approved and confirmed and that the said J. M. Wybrants have and recover out of the funds in the registry of the Court the sum of Sixty-one Dollars and Eighty Cents, and all costs by him in this behalf incurred, and that he have a lien on the said funds for the payment thereof with priority on said funds of equal dignity with R. D. Boone and subordinate only to the Continental Wire Company and the Toledo Metal Wheel Company.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of R. D. Boone be and same is hereby approved and confirmed; it is further ordered, adjudged and decreed that the said R. D. Boone recover out of the funds in the registry of the Court the sum of Thirty-five Dollars and all costs by him in this behalf incurred and that he have lien thereon of equal dignity with J. M. Wybrants next after the Interveners, the Continental Wire Company and the Toledo Metal Wheel Company.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of R. H. Owens be and the same hereby is approved and confirmed and that the said R. H. Owens have and recover out of the funds in the registry in the Court the sum of Twenty-five Dollars, together with all costs by him incurred by reason of his said intervention with priority of lien on said fund next after interveners, J. B. Wybrants and R. D. Boone.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. P. Love be and same hereby is approved and confirmed and that the said intervener take nothing by reason of his said intervention and that complainants recover of the said intervener all costs incurred by reason of said intervention, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Evansville Furniture Company be and the same is hereby overruled and disapproved and the complainants' exception thereto are sustained that the Evansville Furniture Company take nothing by reason of its intervention herein and that complainants recover of said Evansville Furniture Company all costs by reason of its intervention herein incurred, for which let execution issue; to which action of the Court in sustaining complainants' exceptions to the master's report, the said intervener, Evansville Furniture Company, excepted and in
168 open Court gave notice of appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of S. I. Bagwell be and the same hereby is overruled and disapproved and the complainants' exceptions thereto sustained and that the said S. I. Bagwell take nothing by reason of his intervention herein and that complainants recover of said S. I. Bagwell all costs by reason of said intervention for which let execution issue; to which action of the Court in sustaining complainants' exceptions to the master's report on the intervention, the said S. I. Bagwell excepted in open Court and gave notice of appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. J. Pickett be and the

same hereby is disapproved and overruled and complainants' exception- thereto sustained; and that the said intervener, J. J. Pickett, take nothing by reason of his said intervention, and that complainants recover from said J. J. Pickett all costs incurred by reason of his intervention herein; for which let execution issue; to which action of the Court in sustaining complainants' exceptions to the master's report on the intervention, the intervener excepted and in open Court gave notice of appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. C. Birkhead be and the same is hereby modified and corrected and that complainants' exceptions thereto in part sustained and intervener's exception- thereto overruled; it is further ordered that the said intervener, J. C. Birkhead, recover herein only the sum of $100.00 which is allowed him as compensation for his services and actual expenses incurred as trustee under the trust deed hereinafter mentioned; which said sum of $100 shall be paid as costs in this cause, and it is further ordered that the complainants recover of the said J. C. Birkhead one-half of all costs incurred by reason of his intervention herein for which let execution issue; to which action of the Court in sustaining complainants' exceptions in part and overruling the intervener's exceptions, the intervener excepted and in open Court gave notice of appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. W. Evans, Master's Number 82, be and the same hereby is approved and confirmed and that the said W. W. Evans recover by reason of his intervention herein, Master's Number 82, One Hundred and Thirty-nine Dollars and Ninety-six Cents, and that the said sum be paid as costs
169 of this proceeding, the same being for rent of the building used and occupied by the Receiver.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Harvester-King Company, Master's Number 91, be and the same is hereby overruled, and the intervenor's exception thereto in part sustained, and it is further ordered that the said Harvester-King Company have and recover out of the funds in the registry of the Court the sum of $250.78 together with its costs in this behalf incurred for the value of goods converted by the Receiver, and that the said sum be paid as costs of the receivership.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Anderson Manufacturing Company, Master's Number 90, be and the same is hereby overruled and disaffirmed and that the exceptions thereto of complainants be sustained and that the said intervener take nothing by reason of its said intervention, Master's Number 90, and that complainants recover of the said intervener all costs by reason of its said intervention incurred, for which let execution issue; to which action of the Court in sustaining complainants' exceptions to said intervention the said intervener excepted and in open Court gave notice of an appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of McLennan County be and the same hereby is approved and affirmed and that said McLennan County recover out of the funds in the registry of the Court the sum of $179.03 on account of its claim for taxes for the years, 1897, together with all costs by it in this behalf incurred and that said sum be paid as costs of the receivership.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the White Sewing Machine Company be and the same hereby is overruled and disaffirmed, and that complainants' exceptions, and each of them, to the master's report on the said intervention of the White Sewing Machine Company, be and the same are hereby in all things sustained, and it is further ordered, adjudged and decreed that the White Sewing Machine Company take nothing by reason of its said intervention herein, for which let execution issue; to which action of the Court in sustaining the exceptions of the complainants to the master's report on the said intervention, the White Sewing Machine Company, interveners, excepted and in open Court gave notice of appeal and asked the Court to fix the amount of the supersedeas bond of appeal, which was accordingly fixed and is hereby fixed at
170 the sum of Thirty-five Hundred Dollars.

It is further ordered, adjudged and decreed by the Court that the Master's report on the intervention of the Provident National Bank be and the same hereby is approved and confirmed; and it is further ordered, adjudged and decreed that the said Provident National Bank recover against the said W. E. Dupree the sum of $15,161.85-100 together with interest on $12,000 thereof at the rate of 10 per cent. per annum and with interest on $977.82 thereof at the rate of 6 per cent. per annum together with all costs by it incurred herein; for the payment of which the said intervener is hereby adjudged a lien on the funds in the registry of the Court subordinate to the lien of the interveners, the Continental Wire Company, The Toledo Metal Wheel Company, D. R. Boone, J. M. Wybrants and R. H. Owens, and subject to the payment of all sums herein adjudged as costs of Court or of the Receivership, but with priority over all other parties herein mentioned, and it further appearing to the Court that said intervener, the Provident National Bank, has in its hands certain collateral notes which are fully described in the original answer of the said Provident National Bank in this cause, and to which reference is hereby made for a particular description thereof, it is ordered that the said intervener, the Provident National Bank, do turn over to and deliver to the Receiver herein Frank F. Finks, Esq., all of said collateral securities upon demand, and it is further ordered that the said Receiver, Frank F. Finks, do forthwith sell said collateral security, either at public or private sale for cash and pay the net proceeds of said sale into the registry of this Court to be applied as part of the funds herein.

It is further ordered, adjudged and decreed that the master's report on the intervention of Sanger Brothers be and the same hereby is modified and the exception of complainants thereto is sustained

and that the said Sanger Brothers have and recover of the defendant, W. E. Dupree, the sum of Two Thousand Eighteen Dollars and Sixty-six Cents, together with interest on $1,500.00 thereof, at the rate of 10 per cent. per annum, and on $443.66 thereof at the rate of 6 per cent. per annum from this date, together with all costs by them incurred with priority of payment out — funds in the registry of the Court as hereinafter provided, to which action of the Court in sustaining complainants' exceptions said intervener excepted and in open Court gave notice of appeal.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of E. E. Thompson be
171 and the same is hereby approved and confirmed and that the said E. E. Thompson have and recover — the defendant W. E. Dupree, the sum of Eighty-nine Dollars and Thirteen Cents with interest thereon from this date, at the rate of 6 per cent. per annum together with all costs by him in this behalf incurred, with a lien on the funds in the registry of this Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. S. McKamey be and the same is hereby approved and confirmed and that the said J. S. McKamy have and recover — the defendant, W. E. Dupree, $116.40, with interest thereon from this date, at the rate of 6 per cent. per annum, together with all costs by him in his behalf incurred and that the same be a lien on the funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the report of the master on the intervention of Goldstein & Migel be and the same is hereby approved and confirmed, and that the said Goldstein & Migel have and recover of the defendant, W. E. Dupree, the sum — $649.07, together with interest thereon at this date at the rate of 6 per cent. per annum, together with all costs by them in this behalf incurred, with a lien on the funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Nash-Robinson & Co. be and the same is hereby approved and confirmed and that the said Nash-Robinson & Company have and recover — the defendant, W. E. Dupree, the sum of $114.30, with interest thereon after this date, at the rate of 6 per cent. per annum and all costs by them in this behalf incurred with a lien in funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of E. C. Noble be and the same is hereby approved and confirmed and that the said E. C. Noble recover of the defendant, W. E. Dupree, the sum of $502.52 with interest thereon after this day, at the rate of 6 per cent. per annum, together with all costs by him in this behalf incurred, with a lien on the fund in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that

the master's report on the intervention of E. O. Swofford be and is hereby approved and confirmed, and that the said Geo. Green have and recover — the defendant, W. E. Dupree, the sum of
172 $29.09 with interest thereon, at the rate of 6 per cent. per annum after this date, with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of C. F. Smith be and the same is hereby approved and confirmed and that the said E. O. Swofford have and recover of the defendant, W. R. Dupree, the sum of $30, with interest thereon, after this date, at the rate of 6 per cent. per annum, together with all costs by him in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjadged and decreed by the Court that the master's report on the intervention of C. F. Smith be and the same is hereby approved and confirmed and that the said C. F. Smith have and recover — the defendant, W. E. Dupree, the sum of $58.94, with interest thereon at the rate of 6 per cent. per annum from this date, together with all costs by him in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of John T. Walton, Trustee, be and the same is hereby approved and confirmed and that the said John T. Walton, Trustee, have and recover of the defendant, W. E. Dupree, the sum of $25.00, with interest thereon after this date, at the rate of 6 per cent. per annum, together with all costs by him in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adiudged and decreed by the Court that the Master's report on the intervention of E. N. Lynham be and the same hereby is confirmed and that the said E. N. Lynham have and recover *the (of)* defendant W. E. Dupree the sum of $40.00 with interest thereon after this date at the rate of 6% per annum together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adiudged and decreed by the Court that the master's report on the intervention of R. P. Duke be and the same is hereby approved and confirmed and that the said R. P. Duke have and recover of the defendant Dupree the sum of $68.70, together with interest thereon after this date at the rate of 6% per annum, and all costs by him in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

173 It is further ordered, adiudged and decreed by the Court that the master's report on the intervention of D. H. Oakes be and the same is hereby approved and confirmed and that the said B. H. Oakes have and recover of the defendant W. E. Dupree

the sum of $202.05 with interest thereon after this date at the rate of 8% per annum, together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the claim of D. V. Morgan, intervener, be and the same is hereby approved and confirmed and that the said D. V. Morgan have and recover of the defendant W. E. Dupree the sum of $30.00, with interest thereon after this date at the rate of 6% per annum and all costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. T. Herrick be and the same is hereby approved and confirmed and that the said W. T. Herrick have and recover of the said defendant W. E. Dupree the sum of $32.61, with interest thereon at the rate of 6% per annum from this date, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of C. P. Shaffer be and the same is hereby approved and confirmed and that the said C. P. Shaffer have and recover of the defendant W. E. Dupree the sum of $204.90 with interest thereon after this date at the rate of 6% per annum, together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of E. L. Wray be and the same is hereby approved and confirmed and that the complainants' exception- thereto are overruled and that the said E. L. Wray have and recover of the said W. E. Dupree the sum of $466.40 with interest thereon after this date at the rate of 6% per annum, together with all costs by her in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. B. Mays be and
174 the same is hereby approved and confirmed and that the said W. B. Mays have and recover of the said W. E. Dupree the sum of $13.30 with interest thereon at the rate of 5% per annum after this date together with all costs by him in this behalf incurred together with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Hayden Sadler be and the same is hereby approved and confirmed and that the said Hayden Sadler have and recover of the defendant W. E. Dupree the sum of $85.00, together with interest thereon at the rate of 6% per annum *annum* from this date together with all costs by him in this

behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. E. Roach be and the same is hereby approved and confirmed and that the said W. E. Roach have and recover of the defendant W. E. Dupree the sum of $112.50 with interest thereon from this date at the rate of 6% per annum together with all costs by him in this behalf incurred and with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Lucis Gabert be and the same is hereby approved and confirmed and that the said Stardivant recover of the defendant W. E. Dupree the sum of $48.75, with interest thereon at the rate of 6% per annum and all costs by him in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Lucis Gabert be and the same is hereby approved and confirmed and that the said Louis Gabert have and recover of the defendant W. E. Dupree the sum of $35.00 with interest thereon after this date at the rate of 6% per annum together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of D. M. Creswell be and the same is hereby approved and confirmed and that the said D. M. Creswell — of the defendant W. E. Dupree the sum of $150 with interest thereon from this date at the rate of 6% per annum
175 together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court and priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of E. S. Henslee be and the same hereby is approved and confirmed and that the said E. S. Henslee have and recover of the defendant W. E. Dupree the sum of $57.70 with interest thereon after this date at the rate of 6% per annum together with all costs by him in this behalf expended, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Tom Padgitt Company be and the same is hereby approved and confirmed and that the Tom Padgitt have and recover from the defendant W. E. Dupree the sum of $14.72 with interest thereon after this date at the rate of 6% per annum, together with all costs by it in this behalf incurred, with a lien on the funds in the registry of the Court and with a priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Rosebud Furniture Company,

a firm composed of T. C. Tarver alone, be and the same hereby approved and confirmed and the intervener's exceptions to the master's report are in all things overruled (to which action of the Court in overruling intervener's exception, the intervener excepted and in open Court gave notice of appeal).

And that the said T. C. Tarver, doing business as aforesaid have and recover of the defendant W. E. Dupree the sum of $167.19 with interest on $158.07 thereof after this date at the rate of 8% per annum, together with all costs by him in this behalf incurred, except the cost of intervener's exception to master's report, which are hereby taxed against the said intervener to be deducted from his recovery herein, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Waco Furniture Company be and the same hereby is approved and confirmed and that the said Waco Furniture Company have and recover of the said W. E. Dupree the sum of $24.23 with interest thereon after this date at the rate of 6% per annum together with all costs in this behalf expended, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court
176 that the master's report on the intervention of Prendergast and Evans and the same is hereby overruled and disapproved and that the complainants' exceptions thereto are sustained to which action of the Court in sustaining the exceptions of complainants to the said master's report the said Prendergast & Evans excepted and in open Court gave notice of appeal. It is further ordered that the said Prendergast and Evans have and recover of the defendants, W. E. Dupree, the sum of $2638.35 with interest on $2500 thereof at the rate of 10% per annum after this date, together with all costs by them in this behalf incurred, except the costs of complainants' exception to the master's report, which are hereby adjudged against the intervener- and shall be deducted from their recovery herein upon payment of the amount hereby awarded the said interveners, and that said interveners have lien upon the fund in the registry of the Court with priority hereon as here-after provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. C. Riley & Son be and the same hereby is approved and confirmed and that the said J. C. Riley & Son have and recover of the said defendant W. E. Dupree the sum of $62.40 with interest thereon at the rate of 6% per annum after this date together with all costs by them in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Dockery & Co., be and the same hereby is overruled and disaffirmed and the complainants' exceptions thereto are sustained, to which action of the Court the said interveners excepted and in open Court gave notice of appeal, it is further ordered that said Dockery & Co. have and recover of the said

W. E. Dupree the sum of $92.60 together with interest on $87.00 thereof from this date at the rate of 10% per annum and all costs by them in this behalf incurred, except the costs of the exceptions to the master's report herein, which was adjudged against the said interveners to be deducted from their recovery herein, it is further ordeed that the interveners have a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. W. Evans, master's number 83, be and the same is hereby overruled and disaffirmed and complainants' exception to said report are sustained as to $2500 of the claim of said intervener together with interest thereon, and as to all of the attorneys' fees claimed by intervener in said intervention, master's number 83, and complainants' exception to said
177 report as to one thousand dollars thereof and interest thereon overruled, to which action of the Court in so far as same sustained complainants' exception intervener excepted and in open Court gave *notive* [notice] of appeal and to which action of the Court in so far as it overruled complainants' exceptions the complainants excepted and in open Court gave notice of appeal. It is further ordered, adjudged and decreed that the said intervener, W. W. Evans, by reason of his said intervention, master's number 83, have and recover of the defendant W. E. Dupree the one thousand one hundred thirteen dollars and fifty-eight cents, with interest on one thousand dollars thereof from this date at the rate of ten per cent. per annum together with all costs by the said intervener incurred by reason of said intervention, master's number 83, except one half of the costs incurred by reason of the complainants' exception aforesaid, which one-half of said costs are hereby adjudged against the said intervener to be deducted from his recovery herein, and that said intervener have a lien on the funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of W. S. Bates, administrator of W. F. Taft, be and the same is hereby approved and confirmed and that the said W. S. Bates, administrator, have and recover of the defendant W. E. Dupree the sum of $17.15 with interest thereon after this date at the rate of 6% per annum, together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Jas. B. Baker be and the — hereby is approved and confirmed and that the said James B. Baker have and recover of the defendant W. E. Dupree the sum of $2346.70, with interest on $2084.89 thereof from this date at the rate of 10% per annum and $46.40 thereof after this date at the rate of 6% per annum together with all costs by him in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It [is] further ordered, adjudged and decreed by the Court that the master's report on the intervention of Pane, Chatam & Com-

pany be and the same is hereby approved and confirmed, and that the said Pane, Chatam & Company have and recover of the defendant W. E. Dupree the sum of $100.02 with interest thereon after this date at the rate of 6% per annum, together with all costs by him in this behalf incurred with a lien on the fund in the reg-
178 istry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Hopkinson, Kirkey & Fairchild be and the same is hereby approved and confirmed and that the said Hopkinson, Kirksey & Fairchild have and recover of the defendant W. E. Dupree the sum of $29.16 with interest thereon after this date at the rate of 6% per annum and all costs by them in this behalf incurred and a lien on the funds in the registry of the Court with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the report of the master on the intervention of John T. Battle be and the same hereby is approved and confirmed and that the said John T. Battle have and recover of the defendant W. E. Dupree the sum of $106.35 with interest thereon from this date at the rate of 10% per annum together with all costs by him in this behalf incurred with a lien on the funds in the registry of the Court with a priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the report of the master on the intervention of S. W. Slayden be and the same is hereby approved and confirmed and that the said S. W. Slayden have and recover of the defendant W. E. Dupree the sum of $3,085.50 with interest on $2,805.00 thereof at the rate of 8% per annum together with costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided. And it further appearing to the Court that the debt of the said S. W. Slayden against the said W. E. Dupree consists of vendor's lien notes executed by the said W. E. Dupree to O. Bailey and transferred by indorsement of the said O. Bailey to the intervener, S. W. Slayden, under date of December 31, A. D., 1894, each in the sum of $900.00, the first maturing January 1st, 1898; the second maturing January 1st, 1899; and the third maturing January 1st, 1900, and bearing interest at the rate of 8% per annum, payable annually and evidenced by interest coupons attached to said notes, said notes being secured by vendor's lien on Lot 1, Block 2, of the City of Waco, McLennan County, Texas.

It is hereby ordered that upon the payment to the said intervener of his recovery out of the funds in the registry of the Court, the said intervener at once deliver to F. F. Finks, receiver herein, said notes and said interest coupons thereon endorsed to the said receiver with-
179 out recourse, and the said F. F. Finks, receiver, is hereby ordered forthwith to sell said notes and interest coupons at public or private sale for cash and pay the net proceeds of said sale into the registry of this Court to be applied as the other funds in the registry of this cause.

It is further ordered, adjudged and decreed by the Court that

the master's report on the intervention of the Southern Rock Plow Company have and recover of the defend- — -proved and confirmed and that the said Rock Island *Island* Plow Company have and recover of the defend*ant*, W. E. Dupree the sum of $3,949.11, with interest thereon after this date, at the rate of 8 per cent. per annum, together with all costs by them in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Sanders Duck and Rubber Company be and the same hereby is approved and confirmed and that the Sanders Duck and Rubber Company recover of the defendant, W. E. Dupree, the sum of $124.85, with interest thereon after this date, at the rate of 6 per cent. per annum, together with all costs by it in this behalf incurred with a lien upon the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Harvester King Company, Master's Number 89, be and the same is hereby approved and confirmed and that the said Harvester King Company have and recover of the defendant, W. E. Dupree, the sum of $750 with interest thereon after this date, at the rate of 6 per cent. per annum, together with all costs by — in said intervention incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Anderson Manufacturing Company, Master's Number 93, be and the same is hereby approved and confirmed and that the said Anderson Manufacturing Company have and recover on its intervention, Master's Number 93, against the defendant, W. E. Dupree, the sum of $7,551.55, with interest thereon after this date at the rate of 6 per cent. per annum, together with all costs by it in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of E. L. Green be and the same hereby is approved and confirmed and that said E. L.
180 Green recover of defendant, W. E. Dupree, the sum of $302.82, with interest thereon after this date, at the rate of 10 per cent. per annum, together with all costs by him in this behalf expended with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of J. C. Duke, assignee of R. T. Dennis & Bro., be and the same hereby is approved and confirmed and that the said J. C. Duke, assignee as aforesaid, have and recover of the defendant, W. E. Dupree, the sum of $1663.20, with interest thereon after this date, at the rate of 6 per cent. per annum, together with all costs in this behalf incurred, with a lien on the

funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Mansur & Tebbetts Implement Company, assignee of the Orchard City Wagon Company, be and the same hereby is approved and confirmed and that the said Mansur & Tebbetts Implement Company, assignee as aforesaid, have and recover — the defendant, W. E. Dupree, the sum of $7,043.61, with interest thereon, after this date, at the rate of 10 per cent. per annum, together with all costs by it incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the claim of the Mansur & Tebbetts Implement Company, Master's Number 99, be and the same is hereby approved and confirmed and that the said Mansur & Tebbetts Implement Company have and recover of the defendant, W. E. Dupree, the sum of $33,247.47, together with interest thereon after this date, at the rate of 10 per cent. per annum and all costs by it in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the claim of Washburn & Moen Manufacturing Company be and the same hereby is approved and confirmed and that the said Washburn & Moen Manufacturing Company have and recover of the defendant, W. E. Dupree, the sum of $8,709.31, with interest thereon from this date at the rate of 8 per cent. per annum, together with all costs by it in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

181 It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of the Pontiac Buggy Company have and recover of the defendant, W. E. Dupree, the sum of $2,759.50, with interest thereon after this date at the rate of 6 per cent. per annum and all costs by it in this behalf incurred, with a lien on the funds in the registry of the court and with priority thereon as hereinafter provided.

It is further ordered, adjudged and decreed by the Court that the master's report on the intervention of Whitman & Barnes Manufacturing Company be and the same is approved and confirmed and that the said Whitman & Barnes Manufacturing Company recover of the defendant, W. E. Dupree, the sum of $455.99, with interest thereon, at the rate of 6 per cent. per annum, together with all costs by it in this behalf incurred, with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided.

It further appearing to the Court that on the 3rd day of December, A. D., 1906, the defendant, W. E. Dupree, executed a mortgage upon the following described property, viz:

All and singular my entire stock of goods, wares and merchandise lying and situate and being in the County of McLennan, Texas,

in the City of Waco, in the basement and first and second stories of my warehouse heretofore occupied by me as my place of business and being Nos. 101 to 103 inclusive, on the corner of Bridge and First Street-, fronting on the North side of said Bridge Street, it being intended hereby to include all wagons, buggies, machinery, farming implements, sewing machines of every kind and all harness, vehicles and each and every item of personal property lying and belonging in said building.

Also all goods, wares and merchandise, vehicles and personal property of whatever character or description owned by me and situated in my warehouse located on Bridge Street, in Waco, Texas, and being No. 123 on said Street.

Also all my goods, wares and merchandise located and lying and being in my warehouse situate at No. 107 Bridge Street, in Waco, McLennan County, Texas.

Also all my goods, wares and merchandise and personal property of whatever description lying and being in my warehouse situated at No. 108 on said Bridge Street, in Waco, McLennan County, Texas.

Also all and singular the goods, wares and merchandise and property situated and being in the back yards of the store house at No. 107 and No. 108, which said store houses are situated on Bridge Street, in Waco, McLennan County, Texas.

182 Also all sewing machines, wagons owned and used by me in carrying on and conducting my sewing machine business, most of which are stored in the back yard above named.

Also all horses and teams and harness used by me in carrying on said sewing machine business and running said wagons. Also all horses used by me and all harness and wagons for the purpose of delivering goods from my said warehouses and storehouses.

Also all that goods, wares and merchandise and personal property owned by me and situated in my warehouse, being No. 109 on said Bridge Street, in Waco, Texas.

Also all and singular my entire stock of goods, wares and merchandise situated in the store houses heretofore occupied by *he* in the town of Rosebud, Falls County, Texas, and in the back yard thereof, including all hardware, implement- and vehicles and property of whatever kind and description, situate in said warehouse and back yard.

Also all and singular my entire stock of hardware, goods, wares and merchandise and personal property of whatever kind and description, situated in the storehouse occupied by me in said town of Rosebud, in Falls County, Texas, being known as the Weybrand one-story brick building.

Also all and singular my entire stock of goods, wares and merchandise, including furniture, hardware and every kind or character of goods whatsoever situated and being in that certain warehouse used and occupied by me in said town of Rosebud, Falls County, Texas, on Main Street, opposite the Gaines Hotel and being the only warehouse occupied by me in said town of Rosebud.

Also one frame warehouse situated in said town of Rosebud,

Texas, on Lot No. 9, Block No. 18, which said land is leased by me from J. L. Mitchell and said house erected thereon.

Also all horses owned by me in said town of Rosebud, Texas, and also all harness owned by me therein and all wagons, including sewing machine wagons owned by me, in said town of Rosebud, which said horses, harness and wagons were used by me in said town of Rosebud in connection with my business; also sewing machines situated in said storehouse and said warehouse.

Also all and singular my entire stock of goods, wares and merchandise, including all vehicles, farming implements, hardware and each and every kind of personal property whatsoever located and situated in that certain two-story brick business house situated in the town of Mt. Calm, in Hill County, Texas, and near and adjoining the switch running to said house from the main
183 line of the St. Louis Southwestern Ry. Co. in said town of Mt. Calm, Hill County, Texas, being the same warehouse erected by me and heretofore used by me as business house.

Also all goods, wares and merchandise of every character and description, including vehicles and farming implements, situated in the shed and warerooms adjoining said building.

Also four head of horses and also all sewing machines and delivery wagons used in connection with the running and operation of said business, in said town of Mt. Calm.

Also all sewing machines in connect- with the said stock.

Also all and singular that entire stock, of goods, wares and merchandise lying and being in my store house in the town of McGregor, McLennan County, Texas, known as the Boone Building.

Also all goods, wares, merchandise and property owned by me and situated in the back yard of said building.

Also all wagons, horses and teams owned by me in carrying on and conducting the sewing machine business at McGregor and used by me in the delivery of goods in said town.

Also all sewing machines and all property of whatever kind, character and description had and handled by me in carrying on and conducting my said business at the town of McGregor.

Also all goods, wares and merchandise and all property of whatever kind or character stored in my warehouse at McGregor, known as the old corrugated Waco Building Association Building in said town of McGregor.

Also the following described land lying and being in McLennan County, Texas, and described as follows, to wit:

1. Lot No. 7 in Block 2 together with the improvements thereon, consisting of one two story brick storehouse being number 107 on North Second Street in the city of Waco, McLennan County, Texas, said number being subject to a lien of $1124.00 with interest accruing thereon.

2. Lot No. 3 in Block No. 2, in Waco, McLennan Co., Texas, together with the two story brick warehouse situated thereon, being number 109 on Bridge Street, which said property is subject to a lien of $1759.95 and interest accruing thereon.

Also Lot 6 in Block 2 situated on Bridge Street in Waco, Texas,

together with the improvements thereon, consisting of one two story brick warehouse and being number 123 on said Bridge Street, which property is subject to a lien of $1362.00 with interest accruing, which was afterwards placed in the hands of the Receiver, and by him under order of this Court, the personal property above described was sold and the receiver now has in his hands the proceeds of such sales.

184 It is therefore ordered, adjudged and decreed by the Court that the mortgage lien aforesaid be and the same is hereby foreclosed as it existed on the 3rd day of December, 1896, on all of the aforesaid real estate and on the proceeds of said personal property, and the Receiver is hereby directed to pay into the registry of th Court said proceeds now on hand at once and to pay into the Court any proceeds of any of said property which may hereafter come into his hands, as soon as the same is received by him, and the Clerk of this Court is hereby directed to issue an order directing said Receiver, as special commissioner, to sell all of said real estate, except Lot No. 107 on North Second Street in the City of Waco, being a part of Lot No. 7 Block 2 and fronting 25 feet on the public square and running back fifty feet across said lot, being the same property described in the mortgage aforesaid as lot 107 on Second street in the city of Waco, McLennan Co., Texas; said real estate shall be sold, however, subject to all prior liens existing thereon on the 3rd day of December, 1896, superior to the lien of said trust deed.

It is further ordered that the funds now in the registry of this Court in this suit and the funds which shall hereafter be deposited in the registry of this Court in this suit be applied as follows:

First. To the payment of the recoveries awarded herein to the Continental Wire Co., Toledo Metal Wheel Company.

Second. To the payment of the recoveries awarded herein to J. M. Weybrand, D. R. Boone, R. H. Owens, with priority among them as hereinafter awarded.

Third. To the payment of the costs in this behalf incurred including the sum of $800.00 allowed to the Standing Master, A. S. Lathrop, Esq., as full compensation for all services rendered and to be rendered herein and the sum of $2500.00 (less such sums as he may have heretofore drawn out of the fund) awarded to Frank F. Finks, Esq., Receiver, as full compensation for all services heretofore rendered and to be rendered herein and the sum of One Thousand Dollars allowed to A. F. McCormick, Esq., as full compensation for all services rendered and to be rendered as attorney for the Receiver herein, and $2500.00 as full compensation to McCormick & Spence and Baker, Botts, Baker & Lovett, attorneys for complainants as full compensation for all services heretofore rendered

185 herein and the sum of $250 allowed to J. D. Williamson, as the attorney for the complainants as full compensation for all services heretofore rendered or to be rendered herein, which allowances shall be taxed and paid as costs in this suit as shall all costs of the receivership.

Fourth. To the payment of the recovery of the Provident National Bank.

Fifth. To the payment of the recoveries herein to Sanger Bros.,

E. E. Thompson, J. S. McKamy, Goldstein & Migel, Nash-Robinson & Co., E. C. Noble, George Greer, E. O. Swofford, C. F. Smith, John T. Walton, Trustee, E. N. Lynham, R. P. Duke, B. H. Owens, D. V. Morgan, W. T. Herrick, C. P. Shaffer, E. L. Ray, W. B. Mays, Hayden Sadler, W. B. Roach, C. J. Stardivant, Louis Gabert, D. M. Creswell, H. M. Henslee, Tom Padgitt Company, P. C. Tarver, doing business under the firm name of Rosebud Furniture Company, Waco Furniture Company, Prendergast & Evans, J. C. Riley, Dockery & Co., W. W. Evans, W. S. Bates, Administrator, Jas. B. Baker, Pane-Chatam & Co., Hopkinson, Kirksey & Fairchild, John T. Battle, S. W. Slayden and J. C. Duke, Assignee of R. T. Dennis & Co.

Said recoveries in this fifth class to be paid in full if there shall be sufficient funds to do so, but if the funds in the registry of the Court shall not be sufficient to pay the claims issued fifth class in full, then the amount of funds remaining after paying all charges prior to the fifth class, as herein established, shall be prorated among the creditors of W. E. Dupree in said fifth class in proportion to the amount of their respective recoveries herein.

Sixth. To the payment of the recoveries awarded herein to the Southern Rock Island Plow Company, Sanders Duck and Rubber Co., Harvester King Company on its recovery on intervention, Master's No. 89, Anderson Manufacturing, on its recovery in Master's No. 93, E. L. Green, Mansur & Tebbetts Implement Company, Assignee of Orchard City Wagon Company, Mansur & Tebbetts Implement Co. on its recovery in Master's No. 99, the Washburn & Moen Manufacturing Company; and if there shall be sufficient funds in the registry of the Court to pay off and satisfy the recovery of said sixth class in full, they shall be so paid, but, if the funds after payment of all prior claims to the said sixth class be insufficient to pay
off the recoveries awarded to the creditors of the said W. E.
186 Dupree in the sixth class in full, then the amount on hand
after paying off all charges prior to said sixth class, shall be prorated among the creditors in said sixth class in proportion to the amount of their respective recoveries herein.

Seventh. Should there remain any funds in the registry of the Court after paying off all the charges on said fund hereinbefore classified, then the recovery herein awarded to the Pontiac Buggy Company and the Whitman & Barnes Manufacturing Company shall be paid.

But if the said funds applicable to their payment shall not be sufficient to pay both Pontiac Buggy Company and the Whitman & Barnes Manufacturing Company in full, then said funds remaining on hands after the creditors in the sixth class herein shall have been paid in full, shall be prorated on the claims of the said Pontiac Buggy Co. and the Whitman & Barnes Manufacturing Company in proportion to their respective recoveries herein.

Eighth. Should there remain any funds in the registry of the Court in this case after paying off all charges against said fund as hereinbefore set forth, the same shall be paid to the defendant, W. E. Dupree.

It is further ordered that the apportionment among the inter-

veners of the amount allowed the stenographer for services performed at the hearing before the Master hereinbefore made by the Clerk be approved and confirmed, and it is further ordered that the $800.00 allowed the Master for services herein heretofore ordered taxed as costs be and the same is hereby apportioned among the interveners in proportion to the amounts claimed by the interveners and where costs have been heretofore adjudged against the said interveners, the same shall include the proportional part of said stenographer's and Master's compensation.

It is further ordered that execution issue in favor of each and every creditor adjudged a recovery against the said W. E. Dupre for such part of his recovery against said defendant as is not paid and liquidated out of the funds in the registry of the Court.

Dated this June 30th, 1897.

CHAS. SWAYNE, *Judge.*

187 *Vendor's Lien Note Given by W. E. Dupree to O. Bailey.*

Filed March 2, 1906.

Principal Note.

Loan No. 863. $900.

WACO, TEXAS, *December 31st, A. D.* 1894

On the first day of January, 1898, for value received, I promise to pay to the order of O. Bailey, at Waco, Texas, the sum of Nine Hundred Dollars, with interest thereon from date till paid, at the rate of eight per cent per annum payable yearly on the first day of January each year, according to the tenor of three interest coupon notes bearing even date herewith and attached to this note, and numbered from one to three both inclusive. Said coupons to bear interest at the rate of 10 per cent. per annum after maturity, with 10 per cent. of the whole amount unpaid hereon for attorney's fees, besides the court costs, if the holder hereof has to raise suit or go into the probate or other Court in respect hereof or of the property securing it.

This note is secured by deed of trust on Lot one (1) in Block two (2) of City of Waco, Texas.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse. O. Bailey, without recourse. S. W. Slayden, without recourse, pay to the order of J. C. Duke. F. F. Finks, Receiver, without recourse. J. C. Duke. No. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Interest Coupon No. 3.

Loan No. 863. $72.00.

WACO, TEXAS, 31*st December, A. D.* 1894.

On the first day of January, 1898, for value received I promise to pay to the order of O. Bailey at Waco, Texas, the sum of seventy-two dollars, being the interest due on that day on note of even date herewith, No. 863. This coupon bears interest after maturity at the rate of 10 per cent. per annum, and is secured by deed of trust duly recorded.

W. E. DUPREE.

188 (Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse. O. Bailey, without recourse. S. W. Slayden. Without recourse pay to the order of J. C. Duke. Frank F. Finks, Receiver. Without recourse, J. C. Duke. No. 274 Eq. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Vendor's Lien Note Given by W. E. Dupree to O. Bailey.

Filed March 2, 1906.

Principal Note.

Loan No. 864. $900.

WACO, TEXAS, 31*st December, A. D.* 1894.

On the first day of January, 1900, for value received, I promise to pay to the order of O. Bailey at Waco, Texas, the sum of nine hundred dollars, with interest thereon from date till paid, at the rate of eight per cent. per annum, payable yearly on the first day of January each year according to the tenor of five interest coupon notes bearing even date herewith and attached to this note and numbered from one to four both inclusive. Said coupons to bear interest at the rate of 10 per cent. per annum after maturity, with 10 per cent. of the whole amount unpaid hereon for attorney's fees, besides the Court costs, if the holder hereof has to raise suit or go into the Probate or other Court in respect hereof or of the property securing it.

This note is secured by deed of trust on Lot one (1) in Block two (2) of Waco, Texas.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke, Frank F. Finks, Receiver. Without recourse, J. C. Duke. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Interest Coupon No. 3.

Loan No. 864. $72.00.

WACO, TEXAS, 31*st December*, A. D. 1894.

On the first day of January, 1898, for value received, I promise to pay to the order of O. Bailey at Waco, Texas, the sum of
189 seventy-two dollars, being the interest due on that day on note of even date herewith, No. 864. This coupon bears interest after maturity at the rate of 10 per cent. per annum, and is secured by deed of trust duly recorded.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke, Frank F. Finks, Receiver. Without recourse, J. C. Duke. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Interest Coupon No. 4.

Loan No. 864. $72.00.

WACO, TEXAS, 31*st December*, A. D. 1894.

On the first day of January, 1899, for the value received, I promise to pay to the order of O. Bailey at Waco Texas, the sum of seventy-two dollars being the interest due on that day on note of even date herewith, No. 864. This coupon bears interest after maturity at the rate of 10 per cent. per annum, and is secured by deed of trust, duly recorded.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke, Frank F. Finks, Receiver. Without recourse, J. C. Duke. No. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Vendor's Lien Note Given by W. E. Dupree to O. Bailey.

Filed March 2, 1906.

Principal Note.

Loan No. 865. $900.

WACO, TEXAS, 31*st December*, A. D. 1894.

On the first day of January, 1900, for value received, I promise to pay to the order of O. Bailey at Waco, Texas, the sum of
190 nine hundred dollars, with interest thereon from date till paid, at the rate of eight per cent. per annum, payable yearly

on the first day of January each year, according to the tenor of five interest coupon notes, bearing even date herewith, and attached to this note, and numbered from one to five both inclusive. Said coupons to bear interest at the rate of 10 per cent. per annum after maturity, with 10 per cent. of the whole amount unpaid hereon for attorney's fees, besides the Court costs, if the holder hereof has to raise suit or go into the Probate or other Court in respect hereof or of the property securing it.

This note is secured by the deed of trust on Lot one (1) in Block two (2) of Waco, Texas.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke, Frank F. Finks, Receiver. Without recourse, J. C. Duke. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Interest Coupon No. 3.

Loan No. 865. $72.00.

WACO, TEXAS, 31*st December*, A. *D.* 1894.

On the first day of January, 1898, for value received, I promise to pay to the order of O. Bailey at Waco, Texas, the sum of seventy-two dollars, being the interest due on that day on note of even date herewith, No. 865. This coupon bears interest after maturity at the rate of 10 per cent. per annum, and is secured by deed of trust duly recorded.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke. Frank F. Finks, Receiver. Without recourse, J. C. Duke. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Interest Coupon No. 4.

Loan No. 865. $72.00.

WACO, TEXAS, *December* 31*st*, A. *D.* 1894.

On the first day of January, 1899, for value received, I
191 promise to pay to the order of O. Bailey at Waco, Texas, the sum of seventy-two dollars, being the interest due on that day on note of even date herewith, No. 865. This coupon bears interest after maturity at the rate of 10 per cent. per annum, and is secured by deed of trust, duly recorded.

W. E. DUPREE.

(Indorsed:) Pay to order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke, Frank F. Finks, Receiver. Without recourse, J. C. Duke. No. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Interest Coupon No. 5.

Loan No. 865. $72.00.

WACO, TEXAS, *December 31st, A. D.* 1894.

On the first day of January, 1900, for value received, I promise to pay to the order of O. Bailey at Waco, Texas, the sum of seventy-two dollars, being the interest due on that day on note of even date herewith, No. 865. This coupon bears interest after maturity at the rate of 10 per cent. per annum, and is secured by deed of trust, duly recorded.

W. E. DUPREE.

(Indorsed:) Pay to the order of F. F. Finks, Receiver, without recourse, O. Bailey. Without recourse, S. W. Slayden. Without recourse, pay to the order of J. C. Duke, Frank F. Finks, Receiver. Without recourse, J. C. Duke. 274 Eq. Filed March 2, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Appointment of a Substitute Trustee.

Filed 2 of March, 1906.

STATE OF TEXAS, *County of Dallas:*

Know all men by these present, that, whereas, on the 31st day of December, 1894, W. E. Dupree of Waco, McLennan County, Texas, executed five promissory notes of that date, due one, two, three, four and five years thereafter, respectively, payable to O. Bailey
192 or order with interest at the rate of 8% per annum until paid the interest payable annually on the first day of January of each and every year according to the interest coupon notes thereto annexed. Each of said principal notes being for the sum of $900.00.

And, whereas, the said W. E. Dupree, for the purpose of securing the payment of said notes, executed a deed of trust to W. W. Lastinger, trustee on the following described property in McLennan County, Texas, viz: an undivided one-half interest in and to Lot No. 1 and Block No. 2, in the City of Waco, State of Texas, as shown by the map of said city. Said Lot 1 in said Block 2 fronts fifty feet on Bridge street and runs back 165 feet to an alley.

And, whereas, the last three of said notes above described remain unpaid, together with all interest coupons thereon maturing on and after the first day of January, 1898, and are held by the undersigned through transfers and assignment from O. Bailey the original payee therein:

And, whereas, said trust deed provides that should the W. W. Lastinger fail or refuse, or be disqualified from acting thereunder, the said O. Bailey or his legal representative, (meaning the holder of said notes) should have full power to appoint a substitute trustee in writing, who shall have the same power conferred on W. W. Lastinger:

And, whereas, all of said notes except those held by the undersigned have been paid and the undersigned is the owner and holder of those remaining unpaid as aforesaid:

And, whereas, said W. W. Lastinger has refused to act under said trust deed:

Now, therefore, in consideration of the premises, I, C. W. Mansur, of the City of St. Louis, and State of Missouri, do hereby appoint A. S. Keady of the City of St. Louis and State of Missouri as substitute in accordance with the provisions of said trust deed executed by W. E. Dupree on the 31st day of December, 1894.

Witness my hand on this the 8th day of October, A. D. 1903.

C. W. MANSUR.

STATE OF ——, *County of* ——:

Before me, Edward M. Browder, a notary public in and for said county and State, on this day personally appeared C. W. Mansur known to me to — the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

193 Given under my hand and official seal this the 8th day of October, A. D. 1903.

[SEAL.] EDWARD M. BROWDER,
Notary Public for Dallas County, Texas.

(Indorsed:) No. 274 Eq. C. W. Mansur to A. S. Keady. Appointment as substitute trustee. Filed 2 day of March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Intervention of M. E. and W. E. Dupree in Case of Mansur & Tebbetts Imp. Co. et al. vs. W. E. Dupree et al.

In U. S. Circuit Court for the Northern District of Texas, at Waco.

No. 131 & 132, Consolidated. In Equity.

MANSUR & TEBBETTS IMPLEMENT CO. ET AL.
vs.
W. E. DUPREE ET AL.

Filed 2 Day of Mar., 1906.

To the Honorable Judges of said Court:

Your petitioner, Mollie E. Dupree, joined by her husband, W. E. Dupree, resident citizens of McLennan County, Texas, and by leave of this Honorable Court files this their plea of intervention in this

cause, and shows to the Court: That heretofore on or about the 3rd day of December, A. D. 1896, the said Mollie E. Dupree, was the owner in her own right and as her separate property of the hereinafter described property as is fully set forth in an account or statement hereto attached and marked exhibit "A" and asked to be made a part hereof; said property being situated in the City of Waco, McLennan County, Texas, and in a certain storehouse situated on Bridge Street in said City of Waco, and attached to said storehouse as permanent fixtures thereof.

That on the 3rd day of December, 1896, W. E. Dupree made, executed and delivered to J. C. Birkhead as trustee a deed of trust conveying to him certain property of his the said W. E. Dupree in Waco, and McGregor, McLennan County, Mount Calm, Hill County, and Rosebud, in Falls Counties, Texas; and that the above described property of the said Mollie E. Dupree was not mentioned or in-
194 cluded in said deed of trust. That shortly after the execution of said deed of trust the complainants in this cause made application to and were granted an order by this Honorable Court removing said J. C. Birkhead, trustee, and appointing Frank F. Finks, receiver, whereupon the said receiver took possession of the said storehouse together with the property and fixtures described in said exhibit "A," and used the same in the execution of the order of this Honorable Court as such receiver, and although duly notified by the said W. E. Dupree to give up possession of said property, *he* [the] said receiver continued to use the same, and refused to give or deliver up to said Mollie E. or W. E. Dupree possession thereof, but converted same to his own use and benefit as such receiver without the consent of said Mollie E. Dupree or W. E. Dupree or either of them, and did on or about the 18th day of January, 1897, removed said property from said storehouse and continued to retain possession thereof from that time as such receiver.

Your interveners further show to this Honorable Court, that the reasonable market value of said property on the day when said Frank F. Finks, Receiver, took possession of and converted the said property to his own use as such receiver is the sum of $165.00, and the reasonable market — of each item of said property at the said last mentioned day and date is the amount or sum of money opposite each article in said exhibit "A" hereto attached.

These interveners show to the Court that the said Frank F. Finks continued in possession of and to use the said property after the said demand and became liable to these interveners by so doing in the reasonable value of said property which is the sum of $165.00, or the return of all of said property, that said amount is long since past due and said Frank F. Finks, receiver, is liable to these interveners for the payment thereof or the return of said property in as good condition as when he took possession of same, hence these interveners file this their plea of intervention, and ask that the sum of $165.00 be allowed them as a charge against the funds in said receivers hands, as a part of the expense of said receivership, and that said receiver be ordered and directed to pay said sum of money out of the proceeds of the sale of the property in his hands as such receiver, and that said

be adjudged to be a valid and subsistent claim against the proceeds arising from the sale of said property in the hands of said receiver, or that said receiver be ordered to deliver to these interveners the said property as shown by the said exhibit "A" hereto at-
195 tached in as good condition as when he the said receiver took possession of the same, together with all costs of this intervention.

Interveners further show to the Court that they have filed a suit against said receiver in the Justice Court of Precinct No. 1 of McLennan County, Texas, J. B. Earle, J. P., to recover the said property or its value and that said suit is now pending in said Justice Court, aforesaid.

J. T. HARRISON,
Attorney for Interveners.

STATE OF TEXAS, *County of McLennan:*

Before me, the undersigned authority on this day personally appeared W. E. Dupree, who being sworn on oath says: That the above and foregoing claim, set up and asserted against Frank F. Finks, receiver, and the funds in his hands is true and correct; and that all payments, credits, offsets and discounts which should be allowed thereon have been allowed.

That this intervener has no security or collateral whatever to secure his said claim, other than as set up in his petition for intervention.

W. E. DUPREE.

Sworn to and subscribed before me by W. E. Dupree on this the 3rd day of April, A. D. 1897.

J. T. HARRISON,
Notary Public, McLennan County, Texas.

EXHIBIT A.

Property Belonging to W. E. Dupree Taken Possession of and Converted by Frank F. Finks, Receiver.

WACO, TEXAS, *April 2nd*, 1897.

Frank F. Finks, Receiver, to W. E. Dupree, Dr.

To 2 electric fans at $35 each	$70.00
To 1 office counter, lattice work and money drawer	60.00
To 1 bicycle office railing	5.00
To 1 bicycle bin for holding tools, etc	5.00
To 6 wood panels to cover glass in door at $2 each	12.00
To shelving, flooring, and floor pillars removed from co	10.00
To 12 electric globes at 25c each	3.00
Total	$165.00

196 (Indorsed:) Nos. 131 and 132 consolidated in Equity. Mansur & Tebbetts Imp. Co. *et al. vs.* W. E. Dupree *et al.* Intervention of Mollie E. and W. E. Dupree. Filed April 3, 1897. J. H. Finks, Clerk. Filed June 5, 1897, J. H. Finks, Clerk. By Chas. H. Lednum. No. 274 Eq. Filed 2 day March, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Agreement as to Testimony of M. C. H. Park.

Filed Aug. 14th, 1906.

In the Circuit Court of the United States for the Western District of Texas, at Waco.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

and

C. W. MANSUR ET AL.
vs.
W. E. DUPREE ET AL.

It is agreed that on the final hearing of the above cause only one witness, to-wit, M. C. H. Park, Esq., was examined orally and that he was produced on the part of C. W. Mansur, defendant, in the original bill and plaintiff in the cross bill; that his testimony was taken down by the official stenographer; that the official stenographer lost his notes before the testimony was transcribed; that the parties have reached an agreement as to what the testimony was of said witness, and that it was as follows, to-wit:

Q. What profession, if any, were you following in the years 1896 and 1897?

A. I was practicing law at that time and still follow that profession.

Q. Please state what connection you had with the filing of the intervention of S. W. Slayden in the case of Mansur & Tebbetts Implement Company *et al. vs.* W. E. Dupree *et al.*?

A. I represented Mr. Slayden in the matter, and prepared and filed the only intervention in his behalf in that case.

197 Q. Mr. Slayden is now dead is he not?

A. No.

Q. Do you know where he now resides?

A. He left Waco some years ago and he now resides in New York City.

Q. Did you have anything to do with preparing the final decree in the case of Mansur-Tebbetts Company *et al. vs.* W. E. Dupree *et al.*?

A. Yes; myself and one of the attorneys for the complainant in that case did most of the work in preparing the decree. I was only interested in seeing that S. W. Slayden received under the terms of the decree the full amount for which he intervened. The decree as we prepared it and as it was entered by the Court awarded S. W. Slayden the full amount of his claim, with such a preference on the funds then on hand as resulted in his getting all that he claimed, and was approved by the Court and entered.

Q. At the time you assisted in preparing the final decree which was entered in the case of Mansur-Tebbetts *et al. vs.* W. E. Dupree *et al.*, had you ever heard from S. W. Slayden or W. E. Dupree, or any other person, that Slayden had released, or agreed to release, the securities which he held before Dupree's failure?

A. I have an indistinct recollection of a release being prepared and I think it was before the decree was drawn.

Q. Did S. W. Slayden ever confer with you in reference to the executing of a release of the lien by him at the time of Dupree's failure?

A. I do not recall that he did, but if he had, I certainly would have advised him not to execute it until he got his money.

(Endorsed:) No. 274 Eq. W. E. Dupree *et al. vs.* C. W. Mansur. Agreement as to evidence of M. C. H. Park. Filed Aug. 14th, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Final Decree.

Filed 3rd March, 1906.

No. 274. Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is or-
198 dered, adjudged and decreed as follows, viz: That complainant's bill as to defendant, A. S. Keady, be and the same is hereby dismissed, he having departed this life since the filing of complainant's bill.

It is further ordered, adjudged and decreed by the Court that defendant, C. W. Mansur, individually and as trustee for John Deere Plow Company, successor to Mansur and Tebbetts Implement Company, and for Southern Rock Island Plow Company, and for Washburn & Moen Manufacturing Company, and his servants, agents, employees and attorneys, be and they are hereby forever enjoined and restrained from selling or causing to be sold an undivided one-half interest in that certain parcel of land known as Lot one (1) in Block two (2) of the City of Waco, Texas, under a certain deed of trust and the power of sale contained therein, made by W. E. Dupree to

W. W. Lastinger, as trustee, to secure O. Bailey in the payment of five certain promissory notes for nine hundred dollars each, which deed of trust is dated December 31st, 1894, and three of which said notes are now claimed by said Mansur as trustee, as aforesaid.

It is further ordered, adjudged and decreed by the Court that the cross bill of said C. W. Mansur as complainant, against the said W. E. Dupree and M. E. Dupree, as defendants, filed herein on the 2nd day of February, 1904, be and the same is hereby dismissed, and that said W. E. Dupree and M. E. Dupree as to said cross bill go hence without day.

It is further ordered, adjudged and decreed by the Court that complainants, W. E. Dupree and Mollie E. Dupree, do have and recover of and from defendant, C. W. Mansur, all costs of suit by them incurred in this cause, for which execution may issue.

To all of which rulings and decree of the Court, said C. W. Mansur excepts and gives notice of appeal to our United States Court of Appeals for the Fifth Circuit, which is allowed in terms of the law.

Done this 2nd day of March, 1906.

T. S. MAXEY, *Judge.*

(Indorsed:) No. 274 Eq. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Final decree. Filed 3 day of March, 1906, D. H. Hart, Clerk. By Scott W. Key, Deputy.

199 *Petition for Appeal.*

Filed July 20, 1906.

In the Circuit Court of the United States for the Western District of Texas, at Waco.

No. 274. In Equity.

W. E. DUPREE ET AL.
vs.
C. W. MANSUR ET AL.

and

C. W. MANSUR
vs.
W. E. DUPREE ET AL.

Petition for Appeal.

The above named C. W. Mansur, defendant in the original bill and complainant in the cross bill, conceiving himself aggrieved by the decree made and entered on the 2nd day of March, 1906, in the above entitled cause, does hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the assignment of errors, which

s filed herewith, and he prays that this appeal may be allowed and hat a transcript of the record, proceedings and papers upon which aid order was made, duly authenticated, may be sent to the United States Court of Appeals for the Fifth Circuit.

J. M. McCORMICK,
Solicitor for C. W. Mansur, Defendant in the Original Bill and Complainant in the Cross Bill.

AUSTIN, *July* 20, *A. D.* 1906.

The foregoing claim of appeal is allowed.

T. S. MAXEY,
U. S. Judge.

(Indorsed:) C. W. Mansur appellant, *vs.* W. E. Dupree and M. E. Dupree, appellees. Petition on appeal and order allowing ppeal. Filed 20 day of July, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

200 *Appeal Bond.*

Filed July 20, 1906.

Appeal Bond.

Know all men by these presents, that we, C. W. Mansur as prinipal and —— —— as sureties are held and firmly bound unto W. E. Dupree and M. E. Dupree in the full and just sum of five undred ($500.00) dollars to be paid to the said W. E. Dupree nd M. E. Dupree their certain attorney, executors, administrators r assigns; to which payment well and truly to be made, we bind urselves, our heirs, executors and administrators jointly and sevrally by these presents.

Sealed with our seals and dated this 19th day of July, in the ear of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the United States Circuit Court or the Western District of Texas at Waco, in a suit depending n said Court between W. E. Dupree and M. E. Dupree, as comlainants in the original bill and C. W. Mansur as defendant in he original bill and C. W. Mansur as complainant in the cross ill and W. E. Dupree and M. E. Dupree as defendants in the ross bill, a final decree was rendered against the said C. W. Mansur nd the said C. W. Mansur having obtained the allowance of an ppeal and filed copy thereof in the clerk's office of the said Court o reverse the final decree in the aforesaid suit, and a citation diected to the said W. E. Dupree and M. E. Dupree, citing and admonishing them and each of them to be and appear at a United States Circuit Court of Appeals for the Fifth Circuit to [be] *holden* held] at Fort Worth, Texas, in not exceeding 30 days from the 1st day of July, A. D. 1906.

Now, the condition of the above obligation is such that if the aid C. W. Mansur shall prosecute his said appeal to effect, and

answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

C. W. MANSUR.
J. M. McCORMICK, *Attorney.*
MILLIAM M. ROBINSON.
E. R. SUDERY.

Approved July 20, 1906.

T. S. MAXEY,
United States Judge.

201 STATE OF TEXAS, *County of Dallas:*

I, A. B. Rawlins, Clerk of the District Court in and for Dallas County, do hereby certify that the sureties on the within bond are in my opinion and ample security for the amount therein specified and that I would accept and approve same if presented to me.

Given under my hand and seal of office this 19th day of July, A. D. 1906.

A. B. RAWLINS,
By S. A. RAWLINS.

(Indorsed:) C. W. Mansur, appellant, *vs.* W. E. Dupree and M. E. Dupree, appellees. Bond on appeal. Filed 20 day of July, 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

Assignments of Error.

Filed July 20, 1906.

In the Circuit Court of the United States for the Western District of Texas.

No. 274. In Equity.

W. E. DUPREE ET AL., Complainant,
vs.
C. W. MANSUR ET AL., Defendants,

and

C. W. MANSUR, Cross Complainant,
vs.
W. E. DUPREE ET AL., Defendants to Cross-bill.

Assignment of Error.

And now on the 21st day of July, 1906, came C. W. Mansur, defendant, in the original bill and complainant in the cross bill by J. M. McCormick, his solicitor, and says that the decree in said

cause is erroneous and against the just rights of C. W. Mansur for the following reasons:

202 First. Because the evidence shows that the notes sought to be enforced by C. W. Mansur had not been extinguished by the payment to S. W. Slayden of his recovery in the decree in the case of Mansur & Tebbetts Implement Co. *et al. vs.* W. E. Dupree *et al.*, of date June 26, 1897.

Second. Because the evidence shows that W. E. Dupree and M. E. Dupree were parties to the decree in the suit of Mansur & Tebbetts Implement Co. *et al. vs.* W. E. Dupree *et al.*, of date June 26, 1897, and were bound and concluded by said decree which awarded S. W. Slayden payment of his claim out of the fund on condition that he surrender to the receiver for the benefit of the fund the securities held by him consisting of the notes and liens sought to be enforced herein by C. W. Mansur.

Third. Because the evidence shows that the attempted release by S. W. Slayden of the notes and liens was made after he parted with title to the notes.

Fourth. Because the evidence shows that S. W. Slayden refused to release the notes and trust deed or other liens until after he received his money, which he received out of the fund upon condition that he endorse and deliver the notes to the receiver for sale by the receiver for the benefit of the fund.

Fifth. Because the evidence shows that the decree of June 26th, 1897, which was a final decree to which all the parties here were parties or privies marshalled securities and kept alive the notes and liens sought to be enforced herein by C. W. Mansur.

Sixth. Because the decree of June 26th, 1897, which was in evidence estopped W. E. Dupree and M. E. Dupree from claiming that the sale by the receiver therein ordered, did not pass the title to said notes, sought herein to be enforced, as valid notes secured by the lien declared by said decree on Lot 1, Block 2 of the City of Waco.

Seventh. Because it appears from the evidence that W. E. Dupree and M. E. Dupree are estopped in equity and good conscience by their silence, acquiescence and laches from invoking the protection of a Court of Equity to prevent the execution of the trust deed sought to be enforced herein.

203 Eighth. Because it appears from the evidence that C. W. Mansur had the power to appoint a substitute trustee under the deed of trust to Lastinger, trustee; that he had duly exercised that power and was exercising his contract remedy when enjoined herein, and having been stayed by the Court, should now have his lien foreclosed under the prayer of his cross bill.

Ninth. Because it appears from the evidence that neither W. E. Dupree nor M. E. Dupree came into Court with clean hands in that W. E. Dupree when a merchant in a failing condition undertook out of his non-exempt property to discharge a lien on his exempt property voluntarily conveyed to M. E. Dupree without valuable consideration at a time when he was preferring her as an alleged creditor for $25,866.55 with notes amounting to $71,000.00 and the

evidence showing further that a part of same property was conveyed by him to J. C. Birhead (afterwards his general trustee) on May 25, 1896, for one dollar paid and eight notes for $1,000.00 each retaining vendor's lien and that subsequently this has become the property of M. E. Dupree.

Ninth. Because it appears from the evidence that the decree of June 26, 1897, was not void.

Tenth. Because it appears from the evidence that neither W. E. Dupree nor M. E. Dupree appealed from the decree of June 26, 1897.

Wherefore the said C. W. Mansur prays the said decree herein rendered be reversed and that said Court may be directed to enter a decree dismissing the said original bill, and in *accorance* [accordance] with the prayer of the cross bill.

J. M. McCORMICK.
Solicitor for C. W. Mansur, Defendant and Cross Complainant.

(Indorsed:) No. 274 Equity. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* and C. W. Mansur *vs.* W. E. Dupree *et al.* Assignment of error by C. W. Mansur. Filed 20 day of July, 1906. D. H. Hart, clerk. By Scott W. Key, Deputy.

* * * * * * *

204 *Agreement Concerning the Contents of Record.*

Filed Aug. 14, 1906.

JULY 26, 1906.

Mr. D. H. Hart, Clerk U. S. Court, Austin, Texas.

SIR: We hereby agree that the following portions of the printed record in the case of W. W. Evans, intervener, *vs.* Mansur & Tebbetts Implement Co., only are material, and request that all other parts of said printed record save the following be omitted from the transcript, namely: Please copy the following parts of said record:

Original bill of Mansur & Tebbetts Implement Co. *et als.*, print pages 2 to 12.

Order appointing receiver, pages 12 and 13.

Exhibit "A" to bill, pages 13 to 24.

Original bill of W. B. Belknap & Co., pages 27 to bottom of page 444.

Order on bill, pages 55 and 56.

Order authorizing interventions, page 83.

Order referring interventions to special master, pages 83 and 84.

Original answer of S. W. Slayden, pages 84, 85 and 86.

Order as to filing interventions, page 105.

Answer of respondents, page 106.

Part of testimony taken before the master being that part of the testimony commencing at second line from bottom on page 436 and ending at number 19 on page 439.

205 Order transferring cause to Dallas, page 506.
Final decree, pages 510 to 537.

J. M. McCORMICK,
Attorney for C. W. Mansur.
W. M. SLEEPER,
Attorney for W. E. and M. E. Dupree.

(Indorsed:) No. 274 Equity. W. E. Dupree *et al. vs.* C. W. Mansur *et al.* Agreement. Filed 14 day of Aug. 1906. D. H. Hart, Clerk. By Scott W. Key, Deputy.

206 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Western District of Texas:*

I, D. H. Hart, Clerk of the Circuit Court of the United States in and for the Western District of Texas, do hereby certify that the above and foregoing on 251 pages of typewriting is a true and correct copy of the record in cause No. 274 in Equity, wherein W. E. Dupree *et al.* are complainants and C. W. Mansur *et al.* are defendants and C. W. Mansur is complainant in the cross bill and W. E. Dupree *et al.* are defendants in the cross bill, as the same appears on file and of record in said cause at my office in Waco, Texas.

I further certify that this transcript embraces a true and correct copy of the portions of the printed record in the appeal of W. W. Evans, intervener, *vs.* Mansur & Tebbetts Implement Company *et al.* complainants, intervention in cause No. 131 Equity, as are directed by an agreement of the attorneys herein to be included in this transcript (see page 251 hereof); and I further certify that the original citation on appeal is embraced herein in lieu of a copy thereof.

Witness my official signature and the seal of the said Circuit Court, at office in the City of Waco, Texas, on this the 15th day of August, A. D. 1906.

[SEAL.]

D. H. HART, *Clerk.*
By SCOTT W. KEY, *Deputy.*

207 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Ledoux, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing printed record of 206 pages, in the case of C. W. Mansur, appellant, against W. E. Dupree, *et al.*, appellees, numbered 1606, was printed under my supervision, and is identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 29th day of April, A. D. 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDOUX,
Clerk of the United States Circuit Court of Appeals.

208 Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1906, at Fort Worth, Texas, and on the third Monday in November, A. D. 1906, at New Orleans, Louisiana, before the Honorables Don A. Pardee, A. P. McCormick and David D. Shelby, Circuit Judges.

Be it remembered, That heretofore, to-wit: on the 25th day of August, A. D. 1906, a transcript of record, pursuant to an order of appeal from the Circuit Court of the United States for the Western District of Texas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, wherein C. W. Mansur is appellant and W. E. Dupree, *et al.*, are appellees, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 1606.

That thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

Argument and Submission.

NOVEMBER 27, 1906.

No. 1606.

C. W. MANSUR
vs.
W. E. DUPREE ET AL.

On this day this cause was regularly called, and after argument by J. M. McCormick, Esq., for appellant, and Wm. M. Sleeper, Esq., for appellees, was submitted to the Court.

269 *Opinion of the Court.*

Filed, Jan. 29, 1907. Charles H. Ledmun, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1606.

C. W. MANSUR, Appellant,
vs.
W. E. DUPREE ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Before Pardee, McCormick and Shelby, Circuit Judges.

PARDEE, Circuit Judge, delivered the opinion of the Court:

A statement of the pleadings and facts in this case is unnecessary, because the matters involved are of interest only to parties to the suit and their counsel, and they are, or ought to be, fully advised.

An investigation of the case, in the light of the very able briefs submitted, brings us to the conclusion that the correct decision of the case depends upon the construction and effect to be given to that part of the final decree rendered in consolidated cases of Mansur & Tebbetts Implement Co. and Washburn & Moen Mfg. Co. *vs.* Provident National Bank, being 131 Equity, Dallas, No. 444, and Provident National Bank, *et al.*, and W. B. Belknap & Co. *vs.* Provident National Bank, *et als.*, No. 132 Equity, in the Circuit Court of the United States for the Northern District of Texas on the 30th of June, 1897, as follows:

"It is further ordered, adjudged and decreed by the Court that the report of the master on the intervention of S. W. Slayden be and the same is hereby approved and confirmed, and that the said S. W. Slayden have and recover of the defendant W. E. Dupree, the sum of $3,035.50 with interest on $2,805.00 thereof at the rate of 8 per cent. per annum together with costs by him in this behalf incurred with a lien on the funds in the registry of the Court and with priority thereon as hereinafter provided. And it further appearing to the Court that the debt of the said S. W. Slayden against the said W. E. Dupree consists of vendor's lien notes executed by the said W. E. Dupree to O. Bailey and transferred by indorsement of the said O. Bailey to the intervener, S. W. Slayden, under date of
210 December 31, A. D. 1894, each in the sum of $900.00, the first maturing January 1st, 1898; the second maturing January 1st, 1899, and the third, maturing January 1st 1900, and bearing interest at the rate of 8 per cent. per annum, payable annually, and evidenced by interest coupons attached to said notes, said notes being secured by vendor's lien on Lot 1, Block 2, of the City of Waco, McLennan County, Texas.

It is hereby ordered that upon the payment to the said intervener of his recovery out of the funds in the registry of the Court, the said intervener at once deliver to F. F. Finks, receiver herein, said notes and said interest coupons thereon endorsed to the said receiver without recourse, and the said F. F. Finks, receiver, is hereby ordered forthwith to sell said notes and interest coupons at public or private sale for cash and pay the net proceeds of said sale into the registry of this Court to be applied as the other funds in the registry of this cause.

This decree is conclusive upon all parties and privies among which are the contesting parties in the present suit.

In accordance with the decree the Slayden notes carrying vendor's lien upon Lot 1, Block 2, of the City of Waco, were paid out of the funds in the registry of the Court and were delivered and indorsed to Finks, receiver, "without recourse," and thereafter sold for cash which was paid into the registry to be applied as the other funds in the registry of the cause, to the payment of the claims of creditors having liens on and rights thereto.

It cannot be inferred from the decree that the Court intended said notes should be paid off, and the vendor's lien released. As the case stood when the decree was rendered, Slayden had a vendor's lien on property not included in the fund in Court, and besides had and was claiming a priority over the other creditors on the fund in Court,

and there was no object to pay his claim, except for the benefit of the fund in Court:

The whole matter was one of marshalling securities and adjusting equities among creditors, and two courses were open, one was to restrain Slayden from participating in the general creditor's fund until he had exhausted his outside security under his vendor's lien, and the other was by payment and subrogation.

Although not specifically stated in the decree, the course pursued was by subrogation, paying Slayden in full on transferring his notes to the receiver, thereby fully and effectively subrogating the receiver to the ownership of the notes with the vendor's lien securing the same.

And this was equitable and just and in accordance with the principles of marshalling securities enunciated in the text books:
211 Jeremy Eq. Jur., 528; Adams' Eq., 271, 272; 3 Pom. Sec. 1414; Bispham's Prin. Eq., Sec. 350, 341; and declared and applied by Chief Justice Marshall in Alston *vs.* Munford, 1 Brock, 268; and in Durham *vs.* Rhodes, 23 Maryland, 233; Ross *vs.* Duggan, 5 Colorado, 85; Jenness *vs.* Robinson, 10 N. H. 215; Tarver *vs.* Land Mortgage Bank, 27 S. W. 40; Fears *vs.* Albea, 69 Texas 437.

The appellant in this case is the lawful owner and holder of the Slayden notes with subrogation to the vendor's lien as held by Slayden, and as neither the plea of *res adjudicata* nor of laches can avail against him, he is entitled to have a decree foreclosing the said lien as prayed for in his cross bill.

The decree of the Circuit Court is reversed and the case is remanded with instructions to enter a decree in accordance with the views herein expressed.

Judgment of the Court.

No. 1606.

C. W. MANSUR
vs.
W. E. DUPREE ET AL.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court, in this cause be, and the same is hereby reversed, and this cause remanded to said Circuit Court, with instructions to enter a decree in accordance with the views expressed in the opinion of this Court rendered in this cause.

It is further ordered, adjudged and decreed that the appellees, W. E. Dupree and M. E. Dupree, be condemned to pay the cost of this cause in this Court, for which execution may be issued out of said Circuit Court.

January 22, 1907.

212 *Petition for Hearing.*

Filed February 11th, 1907.

In United States Circuit Court of Appeals, Fifth Circuit.

No. 1606.

C. W. MANSUR, Appellant,
vs.
W. E. DUPREE ET AL., Appellees.

Now comes appellee, Mollie E. Dupree, joined by her husband, W. E. Dupree, and moves the Court to set aside the decision and decree rendered herein on the 22nd day of January, 1907, and to grant a rehearing in this cause for the following reasons and on the following grounds, to-wit:

I.

Because the Court erred in deciding and holding that the decree of June 30th, 1897, rendered in the Circuit Court of the United States for the Northern District of Texas in consolidated causes Nos. 131 and 132, equity, Mansur & Tebbetts Implement Co., *et al.*, *vs.* Provident National Bank, *et al.*, in respect to the intervention of S. W. Slayden, was so far conclusive against the said Mollie E. Dupree as to cut off her right to assert and prove that the vendor's lien against said lot one (1), block two (2), of the City of Waco, was released and discharged by agreement with said S. W. Slayden prior to the time when the deed of trust given by W. E. Dupree on December 3rd, 1896, which was the subject matter of said causes, was executed.

II.

The Court erred in holding and deciding that said decree of June 30th, 1897, in said former action was conclusive of the rights of said Mollie E. Dupree in this action, because said decree of June 30th, 1897, did not adjudicate, pass upon, or determine the matters set up by said Mollie E. Dupree in this cause against the claim asserted by said C. W. Mansur herein, and said decree did not adjudicate and determine that a valid vendor's lien existed against said land to secure payment of said notes, which, by the terms of said decree, were sold by the receiver and bought in by J. C. Duke, assignor of said C. W. Mansur.

III.

213 The Court erred in holding and deciding that J. C. Duke, the assignor of C. W. Mansur, acquired a valid title to the said notes by his purchase from the receiver in said former action under said decree for the reason that the debt evidenced by said notes was merged into the judgment recovered by said Slayden against W. E. Dupree on said notes, by the terms of said decree, and

no title whatever passed to said Duke by his said purchase of said notes.

IV.

The Court erred in holding and deciding that C. W. Mansur was entitled to a foreclosure of the vendor's lien against said lot of land, as against said Mollie E. Dupree, for the reason that the said notes were merged into said judgment in favor of S. W. Slayden and said judgment had been paid off and discharged; and said decree of June 30th, 1897, did not adjudicate or determine any right, title or interest of the said Mollie E. Dupree in said land; and because the evidence shows said Slayden agreed to accept said deed of trust of December 3rd, 1896, in lieu of the vendor's lien against said land and in consideration thereof released said vendor's lien before any rights accrued therein to the complainants in said cause of Mansur & Tebbetts Implement Co., *et al.*, *vs.* The Provident National Bank, *et al.*, in which said decree of June 30th, 1897, was rendered, and because the issue of such payment was not involved in said cause or determined by said decree.

V.

The Court erred in holding and deciding that said C. W. Mansur was entitled to a foreclosure of said alleged vendor's lien, because a portion of said lot of land, to-wit: 50 feet front on Bridge street and running back 125 feet was at the time the chattel mortgage or deed of trust of December 3rd, 1896, was executed, and has ever since been, the business homestead of said Mollie E. and W. E. Dupree, and for that reason the rule of marshalling securities did not apply to said property and the issue of homestead was not made in said cause or determined in said decree; and because the said W. E. Dupree had parted with the title to the whole of said property at the time when said deed of trust of December 3rd, 1896, was executed and has never since owned any title to or interest in said property, so that the rule of marshalling securities could not, and did not apply to said property, and the question as to whether or not said property was subject to the rule of marshalling securities, as against said Mollie
214 E. Dupree, was not made in said cause or determined by said decree of June 30, 1897.

VI.

The Court erred in holding and deciding that the plea of *res adjudicata* was of no avail as against said C. W. Mansur for the reason that said C. W. Mansur claimed said notes under J. C. Duke, who had instituted a suit in the United States Circuit Court for the Northern District of Texas, No. 178, equity, entitled J. C. Duke *vs.* W. E. Dupree, *et al.*, wherein he set out and alleged the same facts as are set out and alleged in the cross bill of said C. W. Mansur in his suit, and a general demurrer was sustained to said plea from which an appeal was taken and the decree of the lower Court sustaining said demurrer was in all things affirmed, whereby the said C. W. Mansur as the assignee of said J. C. Duke, was estopped from setting up the same matters in this suit.

VII.

The Court erred in holding that the plea of laches or limitation
t up by said Mollie E. Dupree and W. E. Dupree as a defense to the
id cross bill, could not avail against the said C. W. Mansur, for the
ason that said notes set out in said cross bill as the basis of the
use of action of said C. W. Mansur, are dated December 31st,
94, and mature January 1st, 1898; January 1st, 1899, and January
t, 1900, and provide that failure to pay interest annually shall ma-
re all said notes at option of holder, which provision of said notes
as set out and acted upon by said J. C. Duke, assignor of said C. W.
ansur, in his bill of equity No. 178, in the Circuit Court of the
nited States, Northern District of Texas, entitled J. C. Duke *vs.*
. E. Dupree *et al.*, and wherein he declared said notes due and
ature on account of such default, which said bill in equity was filed
arch 27th, 1899; and because all of said notes were mature more
an four years prior to the time when the cross bill of said C. W.
ansur in this suit was filed; and because under the laws of Texas
e statute of limitation applies as well to actions on vendor's lien
otes as on other written obligations; and because the statutes of lim-
ation applies as well to actions in equity as to actions at law; and
ere is no fact or circumstances alleged or set out in the cross
ll of said C. W. Mansur which prevents or estops the said Mollie E.
upree or the said W. E. Dupree from pleading the statute of limita-
tion under the laws of Texas to the cause of action asserted
5 on said notes by said C. W. Mansur in his said cross bill.

Wherefore, for the reason stated petitioners pray that the
id decision and decree of this Honorable Court reversing the judg-
ent of the Court below be set aside and a rehearing granted and
ally upon such rehearing that this Honorable Court will affirm the
ecree of the trial Court.

Respectfully submitted.

SLEEPER & KENDALL,
Of Counsel.
W. M. SLEEPER.
Solicitor for Appellee.

I, W. M. Sleeper, solicitor for appellees in the above entitled cause
o hereby certify that, in my opinion, the above and foregoing mo-
on for rehearing is well founded in point of law and should be sus-
ined.

W. M. SLEEPER.
Solicitor for Appellee.

Order Refusing Rehearing.

FEBRUARY 19TH, 1907.

No. 1606.

C. W. MANSUR
vs.
W. E. DUPREE ET AL.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby denied.

216 I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 8 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States for the Western District of Texas) in a certain cause in said Court, numbered 1606, wherein C. W. Mansur is appellant and W. E. Dupree, *et al.*, are appellees, as full true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 29th day of April, A. D. 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

217 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 1606.

C. W. MANSUR, Appellant,
vs.
W. E. DUPREE ET AL., Appellees.

It is hereby stipulated by and between the appellant and appellees that the certified transcript of the record of the proceedings in the United States Circuit Court of Appeals, filed in the Supreme Court of the United States by petitioners at the time of the filing of their petition for writ of certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived.

J. M. McCORMICK,
Solicitor for Appellant.
W. M. SLEEPER,
Solicitor for Appellees.

The foregoing has the following endorsements, to-wit:
No. 1606. C. W. Mansur *v.* W. E. Dupree *et al.* Stipulation.
ed 30 day of Nov., 1907. Charles H. Ledbum, Clerk of the
ited States Circuit Court of Appeals.
A true copy.
Attest with seal this 30th day of November, 1907.

[Seal United States Circuit Court of Appeals. Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

8 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

e President of the United States of America to the Honorable the
Judges of the United States Circuit Court of Appeals for the Fifth
Circuit, Greeting:

Being informed that there is now pending before you a suit in
ich C. W. Mansur is appellant and Mollie E. Dupree and W. E.
upree are appellees which suit was removed into the said Circuit
urt of Appeals by virtue of an appeal from the Circuit Court of
e United States for the Western District of Texas, and we, being
lling for certain reasons that the said cause and the record and
oceedings therein should be certified by the said Circuit Court of
Appeals and removed into the Supreme Court of the United
0 States, do hereby command you that you send without delay
to the said Supreme Court, as aforesaid, the record and pro-
edings in said cause, so that the said Supreme Court may act
ereon as of right and according to law ought to be done.
Witness the Honorable Melville W. Fuller, Chief Justice of the
ited States, the 30th day of October, in the year of our Lord one
ousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

0 [Indorsed:] File No. 20783. Supreme Court of the
United States. No. 380, October Term, 1907. Mollie E.
upree and W. E. Dupree *vs.* C. W. Mansur. Writ of Certiorari.
led 30 day of Nov., 1907. Charles H. Ledbum, Clerk of the
ited States Circuit Court of Appeals.

the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Ledbum, Clerk of said court, do hereby certify that I
ceived the within writ on the 30th day of November, A. D. 1907,
d, whereas, the attorneys for the parties thereto named have, by
tipulation in writing filed in my office on this day, agreed that the
rtified transcript of the record of the proceedings in the United
ates Circuit Court of Appeals filed in the Supreme Court of the
ited States, by petitioners, at the time of the iling of their peti-
n for certiorari, can be taken as a return to the writ of certiorari

issued by the Supreme Court, and the filing of a further certified transcript is hereby waived. Therefore, in compliance with said writ, and by direction of the Judges of this court, I have made and attached hereto a certified copy of said stipulation as a return to the within writ.

Witness my official signature and the seal of said court this the 30th day of November, A. D. 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

221 [Indorsed:] File No. 20783. Supreme Court U. S. October Term, 1908. Term No. 124. Mollie E. Dupree and W. E. Dupree, Petitioners, *vs.* C. W. Mansur. Writ of Certiorari and return. Filed Dec. 3d, 1907.

JUL 9 1907
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~380~~ 124

MOLLIE E. DUPREE AND WILLIAM E. DUPREE,
PETITIONERS,

vs.

C. W. MANSUR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

J. J. DARLINGTON,
SLEEPER & KENDALL,
Solicitors for Petitioners.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 27350

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 380.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE,
PETITIONERS,

vs.

C. W. MANSUR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Mollie E. Dupree and William E. Dupree respectfully shows as follows:

1. Heretofore, to wit, in the year 1896, and thereafter, the petitioner Mollie E. Dupree acquired title, as her separate estate, to lot 1, in block 2, in the city of Waco, in the State of Texas, subject to five promissory notes for $900 each, payable in one, two, three, four, and five years from their date, December 31, 1894, executed by petitioner William E. Dupree, payable to the order of one O. Bailey, secured by deed of trust upon an undivided half interest in the said property to one W. W. Lastinger, which provided, among other things, that the holder of the said notes, at his option, might, upon any default in their payment, declare the whole

principal of the indebtedness, with interest, immediately due and payable, and that the said O. Bailey, or his legal representative, should have power to appoint in writing a substitute for the said Lastinger, should the latter for any reason fail to enforce or be disqualified to act under said deed of trust. The said O. Bailey had formerly been the owner of a one-half interest in the said real estate, which one-half interest he had conveyed to the said William E. Dupree contemporaneously with the said deed of trust and promissory notes, and for the further security of the latter had expressly reserved a vendor's lien upon his said one-half interest in the said lot, subject to which reservation also the said petitioner, Mollie E. Dupree, had acquired title to the said lot in 1896, as above set forth. The said promissory notes were subsequently sold and duly transferred by endorsement by the said O. Bailey to one S. W. Slayden, to whom the said Dupree paid the two notes maturing respectively on January 1, 1896, and January 1, 1897.

2. On the 3d day of December, 1896, the petitioner William E. Dupree conveyed certain of his personal and real property to J. C. Birkhead, by deed of trust describing the same, for the benefit of his creditors therein named, including the said S. W. Slayden, after which certain of the said secured creditors instituted two suits, subsequently consolidated, in the United States Circuit Court for the Northern District of Texas, for foreclosure of the said deed of trust to the said Birkhead, in which suits F. F. Finks was duly appointed receiver, and was authorized and directed to sell and dispose of all the property conveyed by the said deed of trust from the said William E. Dupree to the said Birkhead. The said S. W. Slayden having intervened in said consolidated causes, setting up his ownership of the three unpaid promissory notes for $900 each, secured by the said deed of trust to Birkhead and also by the said vendor's lien, it was ordered in the said causes that the amount of the said notes

should be paid to the said Slayden out of the funds in the hands of the receiver; that the said promissory notes should thereupon be endorsed by the said Slayden to the said receiver, and that the latter should sell them at public or private sale for cash, their proceeds to be applied as the other funds in said cause; whereupon the said receiver sold and assigned the said promissory notes for $300 to one J. C. Duke.

3. On May 6, 1898, the said Duke instituted suit in the District Court of McLennan County, Texas, for foreclosure of the deed of trust from William E. Dupree to W. W. Lastinger for payment of the said notes, by his bill in which case, under the option to do so contained in the deed of trust, he declared the entire indebtedness represented by the said promissory notes to be then due and payable. In March, 1899, he dismissed this suit, and on the 27th day of the same month filed a similar bill in the U. S. Circuit Court for the Northern District of Texas, again declaring the indebtedness represented by the said promissory notes to be then due and praying foreclosure, a demurrer to which bill was sustained by the court upon each of the fifteen grounds of demurrer assigned (Record, pp. 98, 102) and the bill dismissed, which action was affirmed by the Circuit Court of Appeals for the Fifth Circuit.

4. The said Duke thereafter assigned the said promissory notes by endorsement to the respondent, who, in April, 1903, which was more than four years after two of the said promissory notes had matured according to their terms, and more than four years after all of them had matured by the holder's said exercise, in a judicial proceeding, in March, 1899, of his right to declare the entire indebtedness then due, demanded of the said Lastinger, trustee in the deed of trust of December, 1894, to secure the said notes, that he proceed to sell the said lot 1 for payment thereof, and, the said

Lastinger declining so to do, respondent designated one A. S. Keady as trustee under the said deed of trust in the place and stead of the said Lastinger, who proceeded to advertise the property for sale at public auction, to enjoin which sale the petitioners instituted suit in the District Court of McLennan County, Texas, and obtained a temporary injunction against the said sale, after which the respondent and the said Keady caused the said cause to be removed to the United States Circuit Court for the Western District of Texas, in which court, among other proceedings, the respondent filed a cross-bill against the petitioners, praying both that the trust deed to Lastinger be decreed to be a valid and existing lien upon the said lot, and that the vendor's lien obtained by the said Bailey should also be established; to which cross-bill the respondents, among other defenses, set up in their answer that the said promissory notes were barred by the statute of limitations of the State of Texas, which limits the right of suit on debts by contract to the period of four years from the maturity thereof, the said cross-bill being filed on the 22d day of February, 1904, while the four years from the maturity of the entire indebtedness had expired in March, 1903, under the holder's exercise of his option hereinbefore referred to, or, if the said option were disregarded, four years from the maturity of the last of the three notes, had expired in December, 1903.

The pendency of petitioners' suit to enjoin sale under the deed of trust for payment of the notes did not suspend the operation of the statute as against the notes themselves (Davis *vs.* Andrews, 88 Tex., 524).

The said Keady having died pending the suit, the Circuit Court of the United States by its decree perpetuated the injunction against the attempted sale, which action the Circuit Court of Appeals reversed (Record, pp. 209, 211), basing its said action upon its holding that the respondent was entitled to "subrogation to the vendor's lien as held by Slayden," and that he was entitled to have a decree foreclosing the lien, as prayed for in his bill.

5. This action of the Circuit Court of Appeals was in effect to hold that the vendor's lien retained by Bailey in his deed of December, 1894, conveying his one-half interest in the property to the petitioner William E. Dupree, accompanied the promissory notes through their several endorsements from Bailey to Slayden; from Slayden to Finks, receiver; from Finks to Duke, and from Duke to the respondent, and that the latter was entitled to have that lien enforced for the payment of the notes, notwithstanding the petitioners' plea of the statute of limitations; which ruling of the court relates exclusively to local laws of the State of Texas and is in direct conflict with the decision of the court of last resort of that State upon the identical questions involved, the Supreme Court of Texas holding that under the Texas statute of limitation no suit to enforce a mortgage or other lien for the security of a contract debt is maintainable at any time after an action for a personal judgment upon the said debt is barred by the statute of limitations (Duty *vs.* Graham, 12 Tex., 427, 437; Parker *vs.* Stone, 23 Tex., 361; Ross *vs.* Mitchell, 28 Tex., 150, 154; Goldfrank *vs.* Young, 64 Tex., 432; Elliott *vs.* Blane, 54 Tex., 246, Hall *vs.* Baker, 60 Tex., 621), and that the assignee of promissory notes for deferred purchase-money, to secure which a lien is reserved, cannot enforce such lien after the statutory bar of limitations has run against the notes themselves, if the maker of the notes relies upon the statute (Stephens *vs.* Mathews' Heirs, 69 Tex., 341).

6. Your petitioners are advised and believe, and therefore aver, that the facts herein set up show a direct conflict between a decision of a circuit court of appeals of the United States and those of the Supreme Court of Texas, and this over questions purely under the laws of Texas, and that they present a case appealing to the exercise by this court of its discretionary power for the issuance of writs of certiorari.

Wherefore the petitioners pray that this honorable court may by writ of certiorari require the United States Court of Appeals for the Fifth Circuit to certify and send to this court the transcript of the record and all proceedings in the case entitled C. W. Mansur, appellant, *vs.* W. E. Dupree *et al.*, appellees, No. 606, to the end that said cause may be reviewed and the questions involved therein determined by this court in accordance in all things with the statute and rules in such case made and provided, and that petitioners may have such other and further relief as the nature of their case may require.

MOLLIE E. DUPREE,
WILLIAM E. DUPREE,
By J. J. DARLINGTON, AND
SLEEPER & KENDALL,
Their Solicitors.

STATE OF TEXAS, *County of McLennan, ss:*

We, Mollie E. Dupree and William E. Dupree, on oath say that we have read the foregoing petition by us subscribed and know the contents thereof; that the allegations therein set forth as of our personal knowledge are true, and that those set forth upon information and belief we believe to be true.

MOLLIE E. DUPREE.
W. E. DUPREE.

Subscribed and sworn to before me this 8th day of June, A. D. 1907.

[Seal Notary Public, County of McLennan, Texas.]

J. H. MACKEY,
Notary Public, McLennan Co., Texas.

J. M. McCormick, Esq.,
Solicitor for C. W. Mansur, Respondent.

Sir: Please take notice that we will submit the foregoing petition to the Supreme Court of the United States, for its action, on Monday, the 14th day of October, A. D. 1907, or so soon thereafter as counsel can be heard.

J. J. Darlington,
Sleeper & Kendall,
Solicitors for Petitioners.

Service accepted this 14th day of June, A. D. 1907.

J. M. McCormick,
Solicitor for Respondent.

[Endorsed:] No. 380. Mollie E. Dupree and William E. Dupree, petitioners, *vs.* C. W. Mansur, respondent. Petition for writ of certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

MOLLIE E. DUPREE and WILLIAM E. DUPREE, *Petitioners*,

vs.

C. W. MANSUR, *Respondent*.

No. 124.

BRIEF FOR PETITIONERS.

STATEMENT.

Out of the complicated and somewhat confusing multiplicity of facts and pleadings set forth in the record, the following are believed to be the facts essential for the consideration and determination of the question presented by the application for certiorari granted by this court in this cause:

On the 31st day of December, 1894, O. Bailey conveyed lot 1, block 2, in Waco, Texas, in which he had an undivided one-half interest, to William E. Dupree, reserving in the deed a vendor's lien to secure five purchase money promissory notes of $900.00 each, all dated December 31, 1894, to the order of O. Bailey, and maturing, respectively, at one, two, three, four and five years from their date. Record, p.

57. On the same date, Dupree executed a deed of trust upon the said undivided one-half interest in the lot to W. W. Lastinger, "for the better securing of the said notes, with all interest due thereon, to the payee or endorsee or holder thereof," and providing, first, that, if there should at any time be default for five days in the payment of the interest due on the notes, "then, at the option of *the said O. Bailey, or the holder of the said promissory notes*, the whole principal, with the interest then accrued, shall at once become due and payable, and the holder may proceed to collect the same by sale under this deed of trust, or otherwise as said holder may elect"; and, secondly, "should the said W. W. Lastinger fail or refuse or be disqualified from acting thereunder, *the said O. Bailey, or his legal representative*, shall have full power to appoint a substitute in writing, who shall have the same powers which are hereby delegated to the said W. W. Lastinger, trustee."

In brief, the deferred purchase money promissory notes were secured, first, by a vendor's lien reserved in the conveyance by Bailey, the grantor, and, secondly, by the deed of trust to Lastinger, upon the undivided one-half interest conveyed by the vendor, the latter conveyance giving to the *holder of the notes* the right to declare their maturity in case of default in the payment of interest, and to *O. Bailey or his legal representative* the right to designate a trustee in the stead of Lastinger, should the latter fail, refuse or become disqualified to act.

Dupree, who was already seized of the other undivided one-half interest, and who by virtue of the Bailey deed became the sole owner of the lot, conveyed all of it except the rear forty feet to the petitioner Mollie E. Dupree on Decembr 2, 1896 (Record, p. 65). The rear forty feet were conveyed to her on May 8, 1902, by one J. C. Birkhead, to whom William E. Dupree had conveyed it (Record, 63-4), thus vesting in her the title to the whole, subject as to an un-

divided one-half interest to the vendor's lien retained by Bailey and to the deed of trust to Lastinger, both to secure the five promissory notes of $900 each.

The validity of this conveyance to Mrs. Dupree, or of her title to the lot in question, subject to the stated liens, is not assailed.

On December 3, 1896 (Record, p. 99), Dupree executed a deed of trust to J. C. Birkhead, upon certain merchandise, goods, chattels and real estate, not including the lot here in controversy, to secure his indebtedness to various creditors, arranged preferentially into groups A, B and C, among which creditors were the Provident National Bank, of Waco, and one S. W. Slayden, who had then become the holder of three of the five promissory notes above referred to. Two days later, December 5, 1896 (Record, p. 89), two of the non-preferred creditors, i. e., The Mansur-Tebbetts Implement Company and the Washburn & Moen Mfg. Co., filed a bill against Wm. E. Dupree, Birkhead and the Provident National Bank, alleging that the latter had other security for its claims against Dupree than the Birkhead deed of trust, and praying, accordingly, the appointment of a receiver and a marshaling of assets—neither the said Mollie E. Dupree nor the said Slayden being parties to this bill, nor the said petitioner's property, lot 1 in block 2, being described or referred to in it. On the same day (Record, p. 108), W. B. Belknap & Co. filed a similar bill against both the petitioners, Birkhead, the Provident National Bank, S. W. Slayden and others, alleging that the said Bank and Slayden had security for their claims in addition to the Birkhead deed of trust, and praying the appointment of a receiver and a marshaling of assets, the petitioner Mollie E. Dupree being made a party defendant in respect to a certain alleged vendor's lien on lot 7, in block 2, which it was claimed had been transferred to her by her co-petitioner and husband, without consideration. The two bills were consolidated, and

one Frank S. Finks was appointed receiver of all the property described in the deed of trust to Birkhead, and of all the collateral security held by the Provident National Bank, S. W. Slayden and others (Record, p. 122). Slayden answered, admitting that he held, as additional security, three of the five promissory notes hereinbefore referred to, secured by the vendor's lien retained in the Bailey deed, which notes would fall due on the first day of January, 1898, 1899 and 1900 (Record, p. 145). It further appeared that, at the time of the making of the deed of trust to Birkhead, Slayden, in consideration of being put into the first preferred class of creditors, agreed to release the vendor's lien retained in the Bailey deed (Record, pp. 49-50, 57); and, though the execution of the release is not shown, Lastinger released the deed of trust securing these notes (Record, pp. 66-67) on December 29, 1897, which release has not been vacated or attacked in any of the several suits contained in the record.

By its final decree in the consolidated suits, the court decreed that Belknap & Co. take nothing by their bill (Record, p. 134), which bill, as above stated, was the only one to which petitioner Mollie E. Dupree was made a party, and, in it, only in respect to her ownership by gift from her husband of a certain promissory note secured by a vendor's lien on lot 7. Further, after passing upon the claims of a large number of intervening creditors, allowing some and rejecting others, the final decree allowed the claim of Slayden to be paid out of the proceeds of the property described in the deed of trust to Birkhead, but required him to endorse to the receiver Finks the three unpaid $900 promissory notes, secured as aforesaid by the vendor's lien retained by Bailey in his deed to Wm. E. Dupree (Record, p. 145)—this decree being passed June 26, 1897, some six months prior to the maturity of any one of the three notes in question. The decree, thereupon, also decreed foreclosure of the deed of trust from Dupree to Birkhead, as to all the property de-

scribed in it, which deed of trust, as above stated, contains no reference to lot 1, in block 2, nor does the decree in any manner refer to that lot except as being the lot on which a vendor's lien had been retained to secure the three unpaid promissory notes—no foreclosure or enforcement of the said vendor's lien, nor any steps to that end, being embraced or referred to in it. Slayden was, accordingly, paid the amount of his claims, from the proceeds of the property embraced in the Birkhead deed of trust, and assigned the three promissory notes in question to Finks, the receiver, who sold them, for $300, to J. C. Duke, the sale being confirmed by the court (Record, p. 41).

Duke first brought suit on these notes in May, 1898, in the State Court, seeking foreclosure of the Lastinger deed of trust, which suit was by him dismissed and stricken from the docket after petitioners had fully answered. He thereupon filed his bill, in March, 1899, in the United States Circuit Court for the Northern District of Texas, reciting the provision of the deed from Bailey to Dupree that, in default of the payment of interest on the notes, the holder had the option to mature the principal thereof, "and your orator avers that such default has been made, and that the whole amount of said notes has become due," the bill thereupon praying that he should be subrogated to the rights of the prior holder of the notes, that the mortgage to Lastinger should be foreclosed in his favor, and that the property, lot 1 in block 2, should be sold for satisfaction of the notes (Record, pp. 68-75).

To this bill, the petitioners demurred upon various grounds, among them that, in the consolidated suits under which Duke acquired his title, there had been no claim of subrogation to the liens securing it, nor any notice to petitioners of any claim of subrogation; that, in these suits, there had been no adjudication concerning the rights of petitioner Mollie E. Dupree; that application to reform that decree was

barred by complainant's laches in failing to file his bill within six months after the passage of the decree, and that complainant, being a mere purchaser of the notes, was not entitled to maintain a bill for reformation (Record, pp. 79-81), which demurrer was "in all things sustained," and the bill dismissed without prejudice, with leave to file a supplemental bill before the rule day of December, 1900. Duke did not avail himself of this leave, but prosecuted an appeal, with the result that the decree sustaining the demurrer and dismissing the bill was, at the November term, 1902, affirmed (Record, pp. 82-88).

Duke then transferred the three notes to the respondent Mansur, who, under the provision in the Lastinger deed of trust, authorizing *Bailey* or his legal representative to appoint a new trustee in Lastinger's stead, undertook, himself, to appoint one A. S. Keady as a substituted trustee for Lastinger, who had released the property, as already shown.

Keady thereupon advertised the property, lot one, in block two, for sale, whereupon the petitioners filed their bill in the District Court of McLennan County, Texas, subsequently transferred to the United States Circuit Court for the Western District of Texas, against Mansur and Keady, to enjoin the sale (Record, pp. 1-11), in which bill, as amended, they alleged that the only authority to appoint a substituted trustee was in Bailey or his legal representative, that Mansur, who was merely the alleged assignee of the promissory notes, had no authority to appoint Keady to the position of substituted trustee, that such appointment carried with it no power or authority to sell, but that such sale would cast a cloud upon the title of the petitioner Mollie E. Dupree, decreasing the value of the property, etc. Mansur answered and, on February 22, 1904, filed his cross bill against the petitioners, recapitulating the proceedings in the consolidated suits, the purchase by Duke of the three promissory notes from the Receiver Finks, that Mansur had succeeded Duke

as holder and owner thereof, and praying that the Lastinger deed of trust should be decreed a valid and existing lien upon the undivided one-half interest in lot one, block two, to secure the payment of the said notes, that the vendor's lien retained in and by the Bailey deed should also be established, and that the petitioners should be foreclosed of their equity of redemption and claim to the said property upon their failure to pay the same, etc. (Record, pp. 18-25). This cross-bill, upon which the decree below under review was based, it will be observed, was filed on February 22, 1904, six years after the maturity of the notes if they matured upon the filing of Duke's bill in 1898, exercising the option to mature them because of the default in the payment of interest, or four years, one month and twenty-two days after the maturity of the last of them, if that maturity be determined by the face of the notes, the Texas statute of limitations barring action upon such notes in four years. After evidence taken, the Circuit Court enjoined the attempted sale by Keady as prayed, and dismissed the cross-bill of Mansur (Record, pp. 61-62), which action was reversed by the United States Circuit Court of Appeals of the Fifth Circuit (Record, pp. 168-70), and the cause remanded with instructions for a decree foreclosing the vendor's lien reserved in the Bailey deed of December 31, 1894, from which decree the present application for certiorari was prayed and allowed.

ASSIGNMENTS OF ERROR.

The court below erred as follows:

I. In holding that the decree in the consolidated suits requiring Slayden to assign the promissory notes to Finks, Receiver, and the receiver to make sale thereof, was conclusive upon the petitioners, or either of them, with respect to lot 1 in block 2.

II & in reversing the decree of the Circuit Court.

III. In holding that the respondent is entitled to a decree foreclosing in his favor the vendor's lien reserved in the deed of December 31, 1894, as security for the promissory notes.

I

It is difficult to see in what respect, or upon what theory, the decree in the consolidated suits can be regarded as conclusive upon, or as in any manner affecting, the petitioners, or either of them, in respect to lot 1 in block 2, the property involved in the present suit.

As to the Belknap suit, the only one to which the petitioner Mollie E. Dupree was a party, the decree was that the complainant take nothing by his suit. The only relief sought in and by it against Mrs. Dupree was in relation to a promissory note secured on lot 7, which the bill in effect charged had been given to her by her husband without consideration, to hinder, delay and defraud his creditors. The bill was, in effect, dismissed against the complainant, with costs.

With respect to the other of the consolidated suits, that brought by the Mansur and Tebbetts Implement Co. *et al.*, Mrs. Dupree was not a party to it, nor was the property involved in this suit mentioned or referred to in it. Its only relation to the subject matter of the present controversy grows out of the fact that Slayden, the then holder of the three promissory notes, for which he had, also, the security of the Birkhead deed of trust, intervened to have his debt paid from the proceeds of the property covered by that deed, and was permitted to do so upon condition of surrendering these notes to the receiver, for the benefit of the less fortunate creditors, under the doctrine of marshalling assets. No subrogation was prayed, or effected, by virtue of that decree. Duke simply became the holder of the promissory notes by purchase, and took them with such incidents as would have accompanied their purchase if made privately. Conceding for the present purpose that, among these incidents, was the

security afforded by the Lastinger deed of trust and the vendor's lien, there was nothing in the decree in the nature of a foreclosure, or of an extension of the period of limitations, or any right enlarging, or additional to, those which Slayden would have had if he had relinquished the security of the Birkhead trust and retained these notes as the security for his debt.

A sale of property under judicial proceeding concludes no one who is not a party to those proceedings. United Lines Telegraph Co. vs. Boston Dep. & Trust Co., 147 U. S., 431, 448; Pittsburg R. R. Co. vs. Long Island Trust Co., 172 U. S., 493, 515; Meyer vs. Construction Co., 100 U. S., 457-8.

Mrs. Dupree being no party to the bill upon which the decree in the consolidated suits was rendered, nor to any bill the relief prayed against her in which was allowed, or related to her ownership of or interest in lot 1, in block 2, she cannot be bound, conclusively or otherwise, by the decree in these causes.

"Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly." Waples vs. United States, 110 U. S., 630, 633. Under the decree in question, the law gave, and Duke took, simply the title to the notes which Slayden endorsed to the receiver for the purposes of sale—no more and no less, and he accordingly acquired no rights except those which resulted from the endorsement of the notes to him.

II.

In the second place, it was also error, it is respectfully submitted, to hold that the respondent was entitled, under his cross-bill or otherwise, to foreclosure of the vendor's lien retained by Bailey in his deed of December 31, 1894, conveying the undivided one-half interest in lot 1 in block 2 to

William E. Dupree, under whom petitioner Mollie E. Dupree derives her title.

With the exception of the two Duke bills of 1898 and 1899, one of which was dismissed by himself and the other by the decree of the court, the cross-bill of respondent, filed February 22, 1904, was, and is, the first effort to enforce either the Lastinger trust, or the vendor's lien for the payment of the three promissory notes. At the date upon which it was filed, all three of the notes were barred by the Texas statute of limitations; and under the laws of that State, as established by its own Supreme Court, the bar of the statute, which was duly pleaded, was a bar, also, to the respondent's recovery under either the deed of trust or the vendor's lien.

> "The lien by the mortgage on the land was but an incident to the debt, and, when the principal falls, the incident must fall with it. The debtor, to secure the appellee against loss, had hypothecated this tract of land, and the law had provided most ample and energetic remedies to enforce the lien thus given. But the time within which the law would afford its aid was limited, and appellee, having failed to avail himself of these aids in the time prescribed, cannot ascribe his loss to any other cause than to his own laches, nor can he require the courts to introduce and adopt new and unusual remedies for his relief." Duty vs. Graham, 12 Tex., 427, 437; Perkins vs. Stearne, 23 Tex., 561; Ross vs. Mitchell, 28 Tex., 150-4.

The only authority relied upon below in opposition to the rule here contended for was Goldfrank *et al.*, vs. Young, 64 Tex., 432, 438; and this authority, so far from overruling those above cited, corroborates them. In that case, a trustee under a deed of trust was proceeding to exercise the power of sale conferred by it to enforce the payment of a promissory note barred by limitations, and the bill was filed

for injunction to restrain him from doing so. Upon the well and long established principle that the statute of limitations is simply a defense to actions, and not a bar to any other remedies which the creditor may have to enforce the payment of his claim, the Texas Supreme Court reversed an injunction allowed below, but declared that, had the holder of the note sought *affirmative* relief from the court, as in the case at bar, it would have been beyond its power to grant it.

> "If the appellees had brought an action at law upon their note, or had sought a foreclosure of the trust deed in an equity proceeding, no court of this State would have given them any relief if the appellee had relied upon the bar of the statute."

In the case at bar, the relief sought by the petitioners below was against the clouding of their title by a pretended substituted trustee, appointed without authority by the holder of the promissory notes, against which attempted sale the Circuit Court granted, properly we submit, an injunction as prayed. The Circuit Court of Appeals reversed this action, and upholds an affirmative equity proceeding, represented by the respondent's cross-bill, for the foreclosure of a trust deed to secure barred promissory notes, notwithstanding the fact that the defendants relied upon the statute. This, we submit, is in direct conflict with the uniform decisions of the Supreme Court of Texas, upon a question of purely state law.

The decree in the Circuit Court of Appeals for foreclosure of the vendor's lien presents the same fatal error. The Texas statute of limitations, as construed by its courts, does not bar the claim of the vendor of land under an express vendor's lien reserved in the deed of sale. Notwithstanding the fact that the deferred purchase money notes are barred by the statute, the vendor may still retake the land if the notes are unpaid; but this right is one personal to himself,

and does not pass to an assignee or endorsee of the notes.

Thus in Elliott vs. Blanc, 54 Tex., 216, 218, it was held:

> "By the transfer of a note given for the purchase money of land, the holder acquires the equitable lien upon the land to which the vendor is entitled as security for its payment, but he gets by such transfer neither legal nor equitable title to the land. If, by his neglect or laches, his action on the note is barred, he cannot maintain, as holder of such note, an action of trespass to try title for the land against the vendee or subsequent purchaser."

In Hale vs. Baker, *et al.*, 60 Tex., 217, it was sought to recover the amount of notes given for the purchase money of the land, accompanied by foreclosure of the vendor's lien, to which suit the defendants pleaded the statute of limitations. The plea being overruled below, the judgment was reversed by the Supreme Court.

> "The court below determined this case upon the erroneous view, as we conceive, that the holder of the superior title to land under a conveyance of it to another party, in which he has reserved a vendor's lien to secure the purchase money, may, because the contract of sale is executory, enforce the lien by suit for the money, notwithstanding the purchase money note may be barred by the statute of limitations. * * * Where the vendor has reserved his lien in the deed, he may enforce the contract specifically by suing upon the purchase money note and foreclosing the lien, or he may, in effect, rescind the contract on default of the note, by disregarding his conveyance and selling the land to another, or recover back his possession by suit. But when the evidence of his debt is barred by limitations, his opportunity for election is lost, and he must rely for his remedy upon the assertion of such rights, only, as his superior title to the land confers upon him as owner. He cannot recover the unpaid purchase money."

In other words, the vendor, notwithstanding the bar of the statute, may rescind the sale because of the failure to pay, and thereupon may sue for and recover the land, *or* he may sue upon the deferred purchase money notes, provided they are not barred. If barred, he can no more maintain an action upon notes of this character than upon any other. The assignee or endorsee of such promissory notes, on the other hand, is limited to the one remedy of suit upon them. He who never had title to the land may not annul the sale because of the failure to pay, nor, if he did so, would the effect be to restore to him a title, having never had any, upon which he might sue in ejectment or trespass.

In Stephens vs. Mathews' Heirs, 69 Tex., 341-4, the action was to sell land for the purpose of paying a promissory note given for the deferred purchase money, to which action the defendants pleaded the statute of limitations. The trial court instructed the jury that, if the note expressly reserved a vendor's lien, the verdict should be for the plaintiffs, notwithstanding the fact that the note was barred by the statute of limitations. A judgment based upon this instruction was reversed on appeal, the court saying: "It is true that the assignee of a note secured by lien may enforce the lien, but it has never been held that the holder of a note given for the purchase of land, and secured by an express lien, he not being the vendor, has any title whatever to the land, and the fact that the note is barred by limitation cannot confer upon such holder a right he would not have had if it were not barred. The endorsee or assignee of such a note, when barred by limitation, has neither a right in nor to the land for which it was given, nor a right to collect the note if its maker interposes the statute of limitations. His right in such case is gone. The vendor of land sold on a credit, where an express lien is reserved, is held to retain the legal title, and he may enforce the payment of the

purchase money by a sale of the land under a decree, or, in the absence of equitable considerations forbidding it, he may cancel the executory contract of sale; but an endorsee or assignee of one or all of the purchase money notes has no right to cancel the contract of sale, or to recover the land in default of payment of the purchase money. His sole right is to have the land sold and its proceeds applied to the satisfaction of the promissory notes held by him; and, if he fails to do this before the notes are barred, like the holder of any other lien, his right will be gone if the maker of the note relies upon the bar of limitation. The vendor of land, by an executory contract, being the holder of the legal title, is not confined to one remedy, as is the person to whom he may transfer purchase money notes, and he may cancel the contract of sale and recover his land, although the purchase money notes may be barred by limitation; but this results from the fact that he has never ceased to hold the title to the land."

Had the statute of limitations run against the notes during and because of the pendency of the consolidated suit, the result would not have been to relieve the bar, since, under the Texas decisions, even an injunction against sale under a trust deed does not suspend the running of the statute. Daw vs. Andrews, 88 Tex., 524. But, as above pointed out, the statute had not commenced to run, as against any one of them, at the time of their sale to Duke in the consolidated suits.

Such are the decisions of the Supreme Court of Texas, upon these questions of purely local, State law, which decisions, it is well settled, are conclusive upon the Federal Courts in cases arising in and governed by the laws of the State.

With respect to the rule that, upon such questions, the Federal Courts will follow the decision of the courts of the State, this court has said: "So far does this

doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it." Louisiana vs. Pillsbury, 105 U. S., 278, 294; Moreley vs. Lake Shore Ry., 146 U. S., 162-6; Elmendorf vs. Taylor, 10 Wheat., 152, 159; Bank vs. Daniel, 12 Pet., 32; R. R. Co. vs. Trust Co., 173 U. S., 99, 107.

The identical proposition relied upon by the petitioners, and denied by the respondent, in this case, is recognized and declared by this court in Ewell vs. Daggs, 108 U. S., at p. 147, as follows: "If that debt (i. e., a debt secured by the lien of a mortgage) is barred by the statute of limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident of the debt. It was so held by the Supreme Court of Texas in Eborn vs. Cannon's Admr., 32 Tex., 231. * * * 'The mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of the principal.' "

Upon such questions, "the law, as held by the Supreme Court of Texas, must furnish the rule of decision." Cordova vs. Hood, 17 Wall., p. 9.

The cause of action being the debt, and its recovery the sole purpose sought to be accomplished, the case is one of concurrent jurisdiction between the courts of law and of equity, and, therefore, one in which the Statute of Limitations is binding in the latter forum. Bank vs. Daniel, 12 Pet., 32, 56; Bacon vs. Howard, 20 How., 22, 26. Even if the respondent's cause of action were based upon a purely equitable right, the statute would be applied by analogy and would be equally conclusive. Miller's Heirs vs. McIntyre, 6 Pet., 61, 66-7; Willard vs. Wood, 1 App. D. C., 44, 59-

60, affirmed 164 U. S., 502, 520. The only cases in which the bar of the statute has not been applied by analogy, where suit has been instituted after the lapse of the statutory period, or in which such delay has not been held fatal laches, are those in which there has been fraudulent concealment of the cause of action, or other special and peculiar circumstances; among which a mere voluntary, unexplained failure to sue within the time prescribed by the statute for the purpose has never been included.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed, and that of the Circuit Court re-instated and affirmed.

SLEEPER & KENDALL,
J. J. DARLINGTON.
Solicitors for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE,
Petitioners,

vs.

C. W. MANSUR, *Respondent.*

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

The petition rests on a supposed erroneous construction and application of the statute of limitations of Texas. It falls within the rule announced in In Re Wood, 143 U. S., 206, where it is said:

> "But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

II.

None of the conditions recognized by the decisions of this

court as warranting the issuance of a writ of certiorari, are disclosed by this application or the record.

American Construction Co. v. Jacksonville, Tampa & Key West R. R. Co., 148 U. S., 372;
Forsythe v. Hammond, 166 U. S., 506;
United States v. Three Friends, 166 U. S., 1;
Lau Ow Bew v. United States, 144 U. S., 47;
Smith v. Vulcan Iron Works, 165 U. S., 518.

III.

We think it might readily be shown that the decision complained of does not conflict with those of the Texas supreme court. Be this as it may, the essential rights of the parties are not involved. The record discloses that a contract remedy involving foreclosure under deed of trust granting power of sale was being exercised when petitioners sued out an injunction. They failed to sustain the claims on which were predicated their right to an injunction. Meantime the trustee in the deed of trust (a substitute appointed on failure of the trustee named in the deed to act) died. The Court found that the debt had not been paid. The debt existing, limitation, if it prevented the foreclosure under the cross bill, did not affect the contract remedy to be exercised under the power of sale in the trust deed. Therefore, if the Court had dismissed the bill and the cross bill, the land would have been sold by another substitute trustee appointed to exercise the power. In other words, the petitioner's land would have been subject to sale to secure the identical debt.

Smith v. Vulcan Iron Works, 165 U.S.,526. Where it is said: "That difference, not affecting the essential rights of the parties, is no ground upon which this Court should exercise its discretionary power of issuing a writ of certiorari." That limitation would not bar sale under trust deed, we cite:

Goldfrank v. Young, 64 Tex., 432;
Fievel v. Zuber, 67 Tex., 275;
Converse v. Davis, 90 Tex., 468.

IV.

The respondent was interfered with by injunction. His preparation for sale by posting notices rendered nugatory, and his sale wrongfully held up until his trustee died, all in the effort of petitioners to defeat the *debt*. Having failed, they should not now be heard to interpose an ineqitable, if not technical, obstacle to his realizing on his security.

Goldfrank v. Young, 64 Texas, 432.

V.

We respectfully submit the Petition should be refused.

W. McCormick

Solicitor for C. W. Mansur, Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 124.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE,
PETITIONERS,

v.

C. W. MANSUR, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief and Argument for Respondent.

J. M. McCORMICK,
HANNIS TAYLOR,
Solicitors for Respondent.

PRESS OF GIBSON BROS.,
WASHINGTON, D. C.
1909.

Supreme Court of the United States.

OCTOBER TERM, 1908.

MOLLIE E. DUPREE AND WILLIAM E. DUPREE, PETITIONERS,
v.
C. W. MANSUR, RESPONDENT.
No. 124.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

When, on December 31, 1894, O. Bailey conveyed the lot in question, in which he had an undivided half interest, to William E. Dupree, he reserved in the deed a vendor's lien to secure five notes for the purchase money of $900 each, all dated December 31, 1894, and payable to the order of Bailey at one, two, three, four, and five years from their date. The deed recites that the "notes are for purchase money for property herein conveyed and the vendor's lien is hereby reserved on the said property to secure the above described notes." On the same day Dupree executed a deed of trust upon the said undivided one-half interest in the lot to W. W. Lastinger, trustee, "for the better securing of the said notes, with all interest

due thereon, to the payee or endorsee or holder thereof." Subject to these burdens, and with express notice of them, Dupree conveyed the land to his wife, Mollie E. Dupree, on December 2, 1896. Bailey sold and duly transferred by endorsement the five notes in question, thus doubly secured, to S. W. Slayden, to whom Dupree paid the two notes maturing respectively on January 1, 1896, and January 1, 1897. The controversy in this case is therefore limited to the collection of the purchase money evidenced by the three notes maturing January 1, 1898, January 1, 1899, and January 1, 1900.

On December 3, 1896, W. E. Dupree conveyed certain of his real and personal property to J. C. Birkhead by a deed of trust for the benefit of his creditors named therein, arranged in classes. Thereafter certain of his secured creditors instituted two suits in the United States Circuit Court for the Northern District of Texas, for the foreclosure of the said deed of trust to said Birkhead. Those suits, afterwards consolidated, are entitled in the index of this record: "Original bill of Mansur and Tebbetts Implement Company *et al. v.* W. E. Dupree, *et al*, and order appointing receiver. * * * Original bill of W. B. Belknap and Company *v.* Provident National Bank *et al.*" These bills were filed for the appointment of a receiver and the marshalling of assets. Dupree was a party, defendant, to both, and his wife a party, defendant to one of them. After the consolidation of the two suits, Frank F. Finks was appointed receiver of all the property described in the deed of trust to Birkhead and of all the collateral securely held by the Provident National Bank, S.W. Slayden and others. Slayden intervened in said consolidated suit, setting up his ownership of the three promissory notes, secured by the said vendor's lien and deed of trust. The final decree, rendered June 30, 1897, so far as it relates to his rights, reads as follows:

"It is further ordered, adjudged and decreed by the court that the report of the master on the intervention of S. W. Slayden be and the same is hereby approved and confirmed and that the said S. W. Slayden have and recover of the defendant W. E. Dupree the sum of $3,085.50 with interest on $2,805.00 thereof at the rate of 8 per cent. per annum together with costs by him in this behalf incurred with a lien on the funds in the registry of the court and with priority thereon and hereinafter provided. And it further appearing to the court that the debt of the said S. W. Slayden against the said W. E. Dupree consists of vendor's lien notes executed by the said W. E. Dupree to O. Bailey and transferred by indorsement of the said O. Bailey to the intervener, S. W. Slayden, under date of December 31, A. D., 1894, each in the sum of $900, the first maturing January 1, 1898, the second maturing January 1, 1899, and the third maturing January 1, 1900, and bearing interest at the rate of 8 per cent. per annum, payable annually and evidenced by interest coupons attached to said notes, said notes being secured by vendor's lien on Lot 1, Block 2, of the City of Waco, McLennan County, Texas. It is hereby ordered that upon payment to the said intervener of his recovery out of the funds in the registry of the court, the said intervener at once deliver to F. F. Finks, receiver herein, said notes and said interest coupons thereon endorsed to the said receiver without recourse, and the said F. F. Finks, receiver, is hereby ordered forthwith to sell said notes and interest coupons at public or private sale for cash and pay the net proceeds of said sale into the registry of this court to be applied as the other funds in the registry of this cause." Neither Dupree nor his wife, both of whom were parties to that decree rendered in the consolidated suit, ever made any objection to such decree or order, and neither of them in or about the pro-

ceedings claimed any right to have said property relieved of the indebtedness on it by payment out of said fund, and neither of them suggested that the provisions of the decree were inequitable or unjust to them or any other person, and neither of them has ever appealed from the decree. Slayden received the full amount of his claim out of the fund then in the registry of the court, and endorsed the notes and delivered them to the receiver, who thereafter sold them to J. C. Duke for the sum of $300, which sale to Duke was confirmed by the court. In May, 1898, Duke instituted a suit in the District Court of McLennan County, Texas, for foreclosure of the deed of trust from Dupree to Lastinger which he voluntarily dismissed; and in March, 1899, he filed a similar bill in the United States Circuit Court of the Northern District of Texas which was dismissed without prejudice.

Thereafter the said Duke assigned the three promissory notes in question by endorsement to C. W. Mansur, the respondent here, who demanded of the said Lastinger, trustee in the deed of trust of December, 1894, to secure said notes, that he proceed to sell the land in question for the payment thereof, and, the said Lastinger declining so to do, respondent designated A. S. Keady as trustee under the said deed of trust in the place and stead of Lastinger, who proceeded to advertise the property for sale at public action. In order to enjoin that sale petitioners instituted suit in the District Court of McLennan County, Texas, and obtained a temporary injunction against the said sale, after which the respondent and the said Keady caused the said cause to be removed to the United States Circuit Court for the Western District of Texas. Therein the respondent Mansur filed a cross-bill against the petitioners, praying that the trust deed to Lastinger be decreed to be a valid and existing lien upon the said lot, and that the vendor's lien obtained

by the said Bailey should also be established. To that cross-bill the respondents, among other defenses, set up in their answer that the said promissory notes were barred by the statute of limitations of the State of Texas, which limit the right of suit on debts by contract to the period of four years from the maturity thereof. The said Keady having died pending the suit the Circuit Court of the United States by its decree perpetuated the injunction against the attempted sale.

Decree of the Circuit Court of Appeals.

By a unanimous court (Judges Pardee, McCormick and Shelby, sitting), the action of the Circuit Court was reversed in an opinion delivered by Judge Pardee in which he says: "A statement of the pleadings and facts in this case is unnecessary, because the matters involved are of interest only to the parties to the suit and their counsel, and they are, or ought to be, fully advised.

"An investigation of the case, in the light of the very able briefs submitted, brings us to the conclusion that the correct decision of the case depends upon the construction and effect to be given to that part of the final decree rendered in consolidated cases of Mansur and Tebbetts Implement Company, and Washburn and Moen Manufacturing Company *v.* Provident National Bank, being 131 Equity, Dallas, No. 444, and Provident National Bank *et al*, and W. B. Belknap and Company *v.* Provident National Bank *et al*, No. 132 Equity, in the Circuit Court of the United States for the Northern District of Texas on the 30th of June, 1897, as follows (the extract from the decree heretofore printed). *This decree is conclusive upon all parties and privies among which are the contesting parties in the present suit.* In accordance with the decree the Slayden notes carrying vendor's lien upon Lot 1,

Block 2, of the city of Waco, were paid out of the funds in the registry of the court and were delivered and indorsed to Finks, receiver, 'without recourse,' and thereafter sold for cash which was paid into the registry to be applied as other funds in the registry of the cause, to the judgment of the claims of creditors having liens on and rights thereto. It can not be inferred from the decree that the court intended said notes to be paid off, and the vendor's lien released. As the case stood when the decree was rendered, Slayden had a vendor's lien on property not included in the funds in court, and besides had and was claiming a priority over the other creditors on the fund in court, and there was no object to pay his claim, except for the benefit of the fund in court. The whole matter was one of marshalling securities and adjusting equities among creditors and two courses were open; one was to restrain Slayden from participating in the general creditor's fund until he had exhausted his outside security under his vendor's lien, and the other was by payment and subrogation. Although not specifically stated in his decree, the course pursued was by subrogation, paying Slayden in full on transferring his notes to the receiver, thereby fully and effectively subrogating the receiver to the ownership of the notes with the vendor's lien securing the same. And this was equitable and just and in accordance with the principles of marshalling securities in the text-books: Jeremy Eq. Jur., 528; Adams' Eq., 271, 272; 3 Pom., Sec. 414; Bispham's Prin. Eq., Sec. 350, 341; and declared and applied by Chief Justice Marshall in Alston *v.* Munford, 1 Brock, 268; and in Durham *v.* Rhodes, 23 Maryland, 233; Ross *v.* Duggan, 5 Colorado, 85; Jenness *v.* Robinson, 10 N. H., 215; Tarver *v.* Land Mortgage Bank, 27 S. W. 40; Fears *v.* Albea, 69 Texas, 437. The appellant in this case is the lawful owner and holder of the Slayden notes

with subrogation to the vendor's lien as held by Slayden and as neither the plea of *res adjudicata* nor of laches can avail against him, he is entitled to have a decree foreclosing the said lien as prayed for in his cross-bill. The decree of the Circuit Court is reversed and the case is remanded with instructions to enter a decree in accordance with the views herein expressed."

Only Two Assignments of Error.

This court is asked to reverse the foregoing decree for two and only two reasons. The first assignment of error is this: "The court below erred as follows: 1. In holding that the decree in the consolidated suit requiring Slayden to assign the promissory notes to Finks, receiver, and the receiver to make sale thereof, was conclusive upon the petitioners or either of them, with respect to Lot 1 in Block 2." "*Who are concluded where suits are heard together.*—Generally, where two suits are heard together, if the proper parties are made to either suit, the judgment or decree will be binding upon all, *though all were not made parties to each suit.*" Am. and Eng. Enc. of Law, vol. 24, pp. 734–5, citing Shenandoah Valley National Bank *v.* Bates, 20 W. Va., 210; Waggoner *v.* Wolf, 28 W. Va., 820. Dupree and wife, who were parties to this decree, and who never made any direct attack upon it by appeal or writ of error, cannot make a collateral attack upon it in a proceeding not instituted for the express purpose of annulling, correcting, or modifying it. Their real contention is that the Circuit Court of Appeals erred in so *construing the decree* of the Circuit Court as to make it transfer the Slayden "notes to the receiver, thereby fully and effectively subrogating the receiver to the ownership of the notes with the vendor's lien securing the same." As clearly stated in their petition

for certiorari (p. 5) the precise contention of petitioners is this: "This action of the Circuit Court of Appeals was in effect to hold that the vendor's lien retained by Bailey in his deed of December, 1894, conveying his one-half interest in the property to the petitioner, William E. Dupree, accompanied the promissory notes through their several endorsements from Bailey to Slayden; from Slayden to Finks, receiver; from Finks to Duke; and from Duke to the respondent, and that the latter was entitled to have that lien enforced for the payment of the notes, notwithstanding the petitioner's plea of the statute of limitations." In other words petitioners contend: (1) that the legal effect of the final decree of June 30, 1897, was to annihilate the vendor's lien in question; (2) that if it did not, that result was attained by their plea of the statute of limitations. These contentions, and only these, are embodied in the two assignments of error now before this court.

I.

The Effect of the Decree of June 30, 1897, was to Keep Alive the Indebtedness Evidenced by the Slayden Notes and the Liens on the Realty.

We are not considering whether there was error in the decree which might have been corrected on appeal, nor whether the method adopted for bringing about a marshalling of the securities held by Slayden was the best method. If the language of the decree shows clearly that the intent of the court was to marshal the securities then there was no merger of the notes. The court as a court of equity had the power to have required Slayden first to exhaust his real estate security. There was no suggestion in that record that the real estate was home-

stead. But it would have been a harsh exercise of discretion to have done so, because Slayden's debt, as a real estate debt, was not due; the notes in fact were not due for any purpose. This one which matured January 1, 1897, and all interest on the others, was paid by W. E. Dupree, evidently to prevent the execution of the trust deed or foreclosure of the vendor's lien by suit. Therefore when the decree came to be entered in June, 1897, the court found these notes not due; one would not be due for six months, another would mature in eighteen months, and the other in thirty months. Therefore, resort was had to the device of having the receiver buy the notes from Slayden and sell them again.

Can it be said that this decree merged the notes so that the payment to Slayden operated to extinguish the debt and liens? Cannot a court of equity decree that a lien which otherwise would be merged or extinguished, shall not be, or that what would ordinarily amount to payment shall not have this effect? We think this power cannot be doubted. Then, did the court in this instance intend to prevent the merger, extinguishment and discharge of the Slayden notes and liens on the land? Clearly so, for the decree in precise terms declares the lien and provides for the delivery of the notes and interest coupons to the receiver, endorsed by Slayden "without recourse." This endorsement, which the decree expressly provides for, imports that the documents are still commercial paper and are valid instruments. Further, the provision for the sale of the notes and interest coupons by the receiver shows beyond controversy that the court was of opinion there was something to sell. See Alston *v.* Muneford, Fed. Cases, No. 267; Williams *v.* Washington, 16 N. E., 137; Durham *v.* Rhodes, 23 Md.; Ross *v.* Duggan, 5 Colo., 85; Jenness *v.* Robinson, 10 N. H., 215; Tarver *v.* L. M. Bk., 27 S. W., 40; Fears *v.* Albea, 69 Tex., 437.

The argument, and authorities cited to support it, that Slayden by accepting under the chattel mortgage waived his real estate liens, is based on a misconception of the nature of Slayden's real estate liens. The authorities cited would be in point, and the argument sound, if these real estate liens were implied liens. There is a fundamental distinction between an implied vendor's lien and one expressly reserved in the conveyance or evidence of debt. Here we have the vendor's lien expressly reserved, and in addition we have a duly executed trust deed. The distinction is drawn and applied in the case of Wilcox *v.* National Bank, 93 Tex., 331. Judge Gaines there discusses the question, and after pointing out the difference between an implied vendor's lien (which is the original meaning of the term) and a contract lien for the purchase price, says: "The cases just cited also recognize the doctrine that when an express lien has been reserved, the taking of a new note with additional security, in place of the original note, does not release the lien. A lien created by mortgage, or by an express reservation, exists as long as the debt exists which it secures, unless it be discharged by some valid agreement between the parties. A debt for which a new promise or obligation with a new security is given, is not of necessity and by that fact alone extinguished, unless the parties agree that the new promise is to be taken as a payment of the debt, or that the new security is given in lieu of the old, and in discharge of it. To our mind it is misleading to speak of a waiver of a lien as applicable to such a case. It is not inaccurate to say that a grantor who has made a deed without reserving a lien, and has taken an independent security for the purchase money, has waived his lien, because in such a connection it is merely meant to say that he has waived his right to claim a lien. But when a lien is once created by express

agreement, the land is not to be disencumbered save by a payment of the debt or a contract for the release or discharge of the incumbrance."

EQUITABLE MERGER ALWAYS A QUESTION OF INTENT.

In the Am. and Eng. Enc. of Law, vol. 20, p. 588, the following statements occur: "Merger may be defined as the absorption of one right or liability into another of higher legal degree, which takes place by operation of law where the two rights or liabilities coincide in the same person at the same time. * * * While this is the legal rule, modifications have been introduced in equity so that *as to equitable estates intention is controlling.* * * * and in contracts satisfaction, frequently confounded with merger, depends upon intention. * * * Waiver like equitable merger is generally a question of intent (see the title Waiver)." In vol. 29 of the same work, under the title "Waiver," pp. 1095–96, the following statements occur: "The validity of a waiver requires that it shall have been made intentionally and voluntarily. Indeed, voluntary choice is the essence of waiver, and the view that waiver is a legal result operating upon a certain state of facts, independent of intent, has been declared to be without foundation. It has been held that a waiver never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it. * * * *Evidence of intent*—The existence of an intent to waive is a question of fact, and must be made clearly to appear. *The best evidence of intention is to be found in the language and conduct of the parties.*" That simple rule when applied to the language of the Circuit Court decree of June 30, 1897, solves the whole difficulty. That decree declares in express terms that the parties did not intend a merger but a subrogation.

The receiver Finks was therefore subrogated, "to the ownership of the notes with the vendor's lien securing the same." As he sold them on that basis to the respondent the "conduct of the parties" confirms the "language" of the decree.

Nature of the Vendor's Lien.

A vendor's lien is for all of the purchase money and for every part of it until paid. It is not merely security for notes that may be given for the consideration, but is for the debt of which the notes were evidence. The lien is not affected by taking a new note, for that is but a change of the evidence, and not a payment of the debt. De Cordova *v.* Hood, 17 Wall., 1. *In that case this court held expressly that, in Texas, an assignment of the notes given for purchase money carries with it the vendor's lien to the assignee.* A purchaser of a vendee who assumes payment of the purchase money due from him, takes the property subject to the vendee's liabilities, legal and equitable. Lewis *v.* Hawkins, 23 Wall. 119. It is admitted that the wife of Dupree took the property from him with express notice of the existence of the vendor's lien in question. There is not the slightest evidence that the vendor's lien was ever waived by Slayden. There is no pretense that the petitioners, or either of them, ever paid the purchase money in question, apart from the legal construction claimed for the final decree of June 30, 1897. The writ of certiorari is primarily a means through which this court can secure uniformity of decision. That is the ostensible ground upon which it is invoked in this case. Certainly that contention can have no possible application to the construction of the decree of June 30, 1897, which concerns only the parties interested and rests entirely upon

its own terms. By overturning the construction given that decree by the Circuit Court of Appeals, this court cannot remove "a direct conflict between a decision of the Circuit Court of Appeals of the United States and those of the Supreme Court of Texas, and this over questions purely under the laws of Texas," for the good and sufficient reason that no such conflict exists or can exist.

II.

The Statute of Limitations can Have no Possible Application.

The second assignment of error claims that the court below erred, "In holding that the respondent is entitled to a decree foreclosing in his favor the vendor's lien reserved in the deed of December 31, 1894, as security for the promissory notes." When the argument in support of that assignment is examined it is found to rest entirely upon the contention that the equitable right to have the vendor's lien foreclosed is barred by certain statutes of limitation of the State of Texas, supposed to apply to the enforcement of purely equitable rights on the equity side of a Federal Court. In the petition upon which this writ was obtained it is averred "that the said promissory notes were barred by the statute of limitations of the State of Texas, which limits the right of suit on debts by contract to the period of four years from the maturity thereof,* * * that the assignee of promissory notes for deferred purchase-money, to secure which a lien is reserved, cannot enforce such lien after the statutory bar of limitations has run against the notes themselves, if the maker of the notes relies upon the statute (Stephens *v.* Mathews' Heirs, 69 Tex. 341, 6). Your petitioners are advised and believe, and

therefore aver, that the facts herein set up show a direct conflict between a decision of a Circuit Court of Appeals of the United States and those of the Supreme Court of Texas, and this over questions purely under the laws of Texas, and that they present a case appealing to the exercise by this court of its discretionary power for the issuance of writs of certiorari." The foundationless assumption that a conflict has arisen between the courts of Texas and those of the United States as to the application of a statute of limitations of the former to the enforcement of a right purely equitable in the latter is the sole and only basis upon which the writ in this case was asked. It is very easy to demonstrate that no such conflict has arisen or can possibly arise. It is unnecessary to remind this court that the Federal Courts adopt state statutes of limitation, as such, only so far as they regulate remedies on the common law side of the court. "Sec. 8, STATE STATUTES OF LIMITATIONS. Federal courts of equity usually follow by analogy state statutes of limitations, especially in foreclosure suits and suits against executors and administrators, *but, at least when their jurisdiction is not concurrent with courts of law*, they do not consider themselves bound by such statutes. It has been said that a Federal court of equity will never follow a state statute of limitations when thereby manifest wrong and injustice would be wrought." Foster's Fed. Practice, 3d ed., vol. 1, pp. 15, 16, citing on the last point Fogg *v.* St. Louis, H. & K. R. Co., 17 Fed. R., 871, 873; Story's Eq. Jur., Sec. 1521. In Kirby *v.* Lake Shore R. R. Co., 120 U. S., 130, this court, quoting from Payne *v.* Hook, 7 Wall., 430, has said: "If legal remedies are some times modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction of the courts of the United States is the same that the High Court

of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union." This court then said: "It is undoubtedly true, as announced in adjudicated cases, that courts of equity feel themselves bound, *in cases of concurrent jurisdiction*, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit." In his note on this case, Rose, in demonstrating that "Federal Courts' equity jurisdiction is not subject to limitation by states," cites "Burdon Central, etc., Co. *v.* Ferris, etc., Mfg. Co., 78 Fed., 422, where, under facts, equitable lien was allowed, although laws of state in which court was sitting would give no lien; Gregg *v.* Sanford, 65 Fed., 157, 28 U. S. App., 313, and Brown *v.* French, 80 Fed., 169, reaffirming the rule." Speaking of the vendor's lien this court said in Slide and Spur Gold Mines *v.* Seymour, 153, U. S. 517, "Such a lien is one which appeals strongly to the favorable consideration of a court of equity," and in Fisher *v.* Shropshire, 147 U. S. 133, "We find no sufficient evidence of waiver here, and we do not regard the lapse of time between the surrender of possession in January, 1881, upon the purchase being made, and the filing of the bill in February, 1883, as justifying a conclusion to that effect." To the enforcement of this purely equitable right, over which a court of law cannot have concurrent jurisdiction, the statute of limitations can never be applied. The only question involved is one of laches.

The Question of Laches.

The case now before this court was begun by petitioners to enjoin a sale under a power—in the words of the petition (p. 4) for certiorari, "to enjoin which sale the petitioners instituted suit in the District Court of McLennan County, Tex., and obtained a temporary injunction against the said sale, after which the respondent and the said Keady caused the said cause to be removed to the United States Circuit Court for the Western District of Texas, in which court, among proceedings, the respondent filed a cross-bill against petitioners, praying both that the deed to Lastinger be decreed to be a valid and existing lieu upon the said lot, and that the vendor's lien obtained by the said Bailey should be established; to which cross-bill the respondents, among other defenses, set up in their answer that the said promissory notes were barred by the statute of limitations of the State of Texas, which limits the right of suit on debts by contract to the period of four years from the maturity thereof." It thus appears in the most positive way that this bill for an injunction, and the cross-bill filed to enforce the vendor's lien, the creature of a court of equity, presents matters *exclusively within the jurisdiction of a court of equity*. It is impossible, therefore, that in dealing with such a suit the jurisdiction of the United States Circuit Court could have been concurrent with the courts of law of Texas in which the statutes of limitation apply. As Foster (Practice, vol. 1, p. 15) has expressed it: "but, at least when their jurisdiction is not concurrent with courts of law, they do not consider themselves bound by such statutes." Thus the statute of limitations, as such, is disposed of. The same author has well said: "It has

been said that a Federal Court of Equity will never follow a State statute of limitation when thereby manifest wrong and injustice would be wrought." Here the monstrous contention is made that, where no innocent third party is concerned, the purchasers of property, who admit they have never paid for it, should be absolved by a federal court of equity, upon principles of analogy to the statute of limitations, because a statutory period of a little more than four years had expired, after the maturity of the last note on January 1, 1900, and the filing of the cross-bill, February 22, 1904. The Circuit Court of Appeals disdained the idea that there had been laches, saying: "The appellant is this case is the lawful owner and holder of the Slayden notes with subrogation to the vendor's lien as held by Slayden, and as neither the plea of *res adjudicata* NOR LACHES can avail against him, he is entitled to have a decree foreclosing the said lien as prayed in his cross-bill."

The Circuit Court of Appeals has thus adjudged, *as a matter of fact*, that the filing of the cross-bill to foreclose the rendor's lien, *within less than two months*, after the lapse of an unusually short statutory period for a suit at law on the notes, *was not laches*. Where there has been a finding of fact in an equity case, and the question here is as to the weight of evidence, the judgment will be affirmed. Alviso *v.* United States, 8 Wall., 339; Harrell *v.* Beall, 17 Wall., 590; Levis *v.* Kengla, 169 U. S., 237. In Griswold *v.* Hazard, 141 U. S., 260, this court said: "Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case." In Townsend *v.* Vanderwerker, 160 U. S., 171, this court said: "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether,

under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." The Circuit Court of Appeals having adjudicated, upon an examination of the evidence in this case, that *a delay of fifty-two days*, after the statutory period fixed as a bar to a suit at law on the notes, did not constitute laches in the filing of the cross-bill to foreclose the vendor's lien, will this court hold on review of that finding of fact, that the weight of the evidence was decidedly the other way?

In its last analysis the case as presented by petitioners in this record on the two assignments of error is this: The Circuit Court of Appeals erred (1) in holding that the right of respondent to foreclose his vendor's lien on the equity side of the Circuit Court was not lost by laches. (2) it erred in holding, under all the circumstances of this case, that *a delay of fifty-two days*, after the lapse of a very short statutory period for a suit on the notes, in the filing of the cross-bill, did not constitute laches. It is here contended, necessarily, that the weight of the evidence on that point is so decidedly against the correctness of the *finding of fact as to laches* made by the Circuit Court of Appeals, that its judgment should be reversed. Each contention is manifestly unsound.

Respectfully submitted.

J. M. McCORMICK,
HANNIS TAYLOR,
Solicitors for Respondent.

DUPREE v. MANSUR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 124. Argued April 6, 7, 1909.—Decided May 17, 1909.

Where it is established law of a State, as it is of Texas, that when a debt is barred by limitations an action to foreclose a lien or mortgage given as security for it is barred also, the law must be enforced in the courts of the United States, whether sitting in law or in equity.

Whether or not the statute of limitation bars a suit to foreclose is a question of substantive law, created by the State and not by the United States, and not one of procedure or jurisdiction; and the Federal court should be governed by the decisions of the State where the land lies. *Slide & Spur Mines* v. *Seymour*, 153 U. S. 509.

The Federal courts cannot declare it wrong or inequitable for a debtor to rely upon a state statute of limitations, as that would be to declare wrong or discreditable what the legislature of the State declares to be right.

THE facts are stated in the opinion.

Mr. J. J. Darlington for petitioners:

A sale of property under judicial proceeding concludes no one who is not party to those proceedings, *United Lines Tel. Co.* v. *Boston Trust Co.*, 147 U. S. 431, 448; *Pittsburg R. R. Co.* v. *Long Island Trust Co.*, 172 U. S. 493, 515; *Meyer* v. *Construction Co.*, 100 U. S. 457, and, therefore, Mrs. Dupree not being a party cannot be bound by the decree.

Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly. *Waples* v. *United States*, 110 U. S. 630, 633.

Under the decree in question, the law gave, and Duke took, simply the title to the notes which Slayden endorsed to the receiver for the purposes of sale and he acquired no rights except those which resulted from the endorsement of the notes to him.

It was also error to hold that the respondent was entitled, under his cross-bill or otherwise, to foreclosure of the vendor's lien retained by Bailey in his deed of December 31, 1894.

The Texas statute of limitations, as construed by its courts, does not bar the claim of the vendor of land under an express vendor's lien reserved in the deed of sale. Notwithstanding the fact that the deferred purchase money notes are barred by the statute, the vendor may still retake the land if the notes are unpaid; but this right is one personal to himself, and does not pass to an assignee or endorsee of the notes. *Elliott* v. *Blanc*, 54 Texas, 216, 218; *Hale* v. *Baker*, 60 Texas, 217; *Stephens* v. *Matthews' Heirs*, 69 Texas, 341–344.

The identical proposition relied upon by the petitioners in this case is recognized in *Ewell* v. *Daggs*, 108 U. S. 147, as follows: "If a debt secured by the lien of a mortgage is barred by the statute of limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident of the debt." *Eborn* v. *Cannon's Admr.*, 32 Texas, 231, held that the mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of the principal.

Upon such questions, the law, as held by the Supreme Court of Texas, must furnish the rule of decision. *Cordova* v. *Hood*, 17 Wall. 9.

The cause of action being the debt, and its recovery the sole purpose sought to be accomplished, the case is one of concurrent jurisdiction between the courts of law and of equity, and, therefore, one in which the statute of limitations is binding in the latter forum. *Bank* v. *Daniel*, 12 Pet. 32, 56; *Bacon* v. *Howard*, 20 How. 22, 26. Even if the respondent's cause of action were based upon a purely equitable right, the statute would be applied by analogy and would be equally conclusive. *Miller's Heirs* v. *McIntyre*, 6 Pet. 61, 66–67; *Willard* v. *Wood*, 1 App. D. C. 44, 59–60, affirmed 164 U. S. 502, 520.

Mr. Hannis Taylor, with whom *Mr. J. M. McCormick* was on the brief, for respondent:

The effect of the decree of June 30, 1897, was to keep alive the indebtedness evidenced by the Slayden notes and the liens on the realty.

The decree did not merge the notes so that the payment to Slayden operated to extinguish the debt and liens. A court of equity can decree that a lien which otherwise would be merged or extinguished, shall not be, or that what would ordinarily amount to payment shall not have this effect. The provision for the sale of the notes and interest coupons by the receiver shows beyond controversy that the court was of opinion there was something to sell. See *Alston* v. *Muneford*, Fed. Cas. No. 267; *Williams* v. *Washington*, 16 N. E. Rep. 137; *Durham* v. *Rhodes*, 23 Maryland, 233; *Ross* v. *Duggan*, 5 Colorado, 85; *Jenness* v. *Robinson*, 10 N. H. 215; *Tarver* v. *L. M. Bk.*, 27 S. W. Rep. 40; *Fears* v. *Albea*, 69 Texas, 437.

Equitable merger is always a question of intent. See 20 Am. & Eng. Enc. of Law, 588, and under "Waiver" in 29 Am. & Eng. Enc. of Law, 1095. In this case the decree declares in express terms that the parties did not intend a merger but a subrogation.

A vendor's lien is for all of the purchase money and for every part of it until paid. It is not merely security for notes that may be given for the consideration, but is for the debt of which the notes were evidence. The lien is not affected by taking a new note, for that is but a change of the evidence, and not a payment of the debt. See *De Cordova* v. *Hood*, 17 Wall. 1, holding that, in Texas, an gnment of the notes given for purchase money carries with it the vendor's lien to the assignee. See also *Lewis* v. *Hawkins*, 23 Wall. 119.

Federal courts adopt state statutes of limitation, as such, only so far as they regulate remedies on the common-law side of the court. They do not follow a state statute of limitations when thereby manifest wrong and injustice would be wrought. 1 Foster's Fed. Practice (3d ed.), 15, 16, citing *Fogg* v. *St.*

Louis., H. & K. R. Co., 17 Fed. Rep. 871, 873; Story's Eq. Jur., § 1521. See *Kirby* v. *Lake Shore R. R. Co*, 120 U. S. 130, citing *Payne* v. *Hook*, 7 Wall. 430, holding that if legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. In his note on this case, Rose, in demonstrating that "Federal courts' equity jurisdiction is not subject to limitation by States," cites *Burdon Central Co.* v. *Ferris Mfg. Co.*, 78 Fed. Rep. 422, where, under facts, equitable lien was allowed, although laws of State in which court was sitting would give no lien; *Gregg* v. *Sanford*, 65 Fed. Rep. 157; *S. C.* 28 U. S. App. 313, and *Brown* v. *French*, 80 Fed. Rep. 169, reaffirming the rule. See also *Slide & Spur Gold Mines* v. *Seymour*, 153 U. S. 517, holding that such a lien is one which appeals strongly to the favorable consideration of a court of equity, and *Fisher* v. *Shropshire*, 147 U. S. 133. To the enforcement of this purely equitable right, over which a court of law cannot have concurrent jurisdiction, the statute of limitations can never be applied. The only question involved is one of laches.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill brought by the petitioner to quiet title to a lot of land in Waco, Texas. A cross-bill was filed by the respondent to establish and foreclose a vendor's lien and mortgage upon the same land. The facts, so far as necessary to a decision, are these. One Bailey conveyed one undivided half of the land in question to William E. Dupree, partly in consideration of five notes, for nine hundred dollars each, maturing in one, two, three, four and five years respectively, from December 31, 1894, the date of the conveyance. By the words of the deed, "the vendor's lien is hereby reserved on the said property to secure the above described notes." On the same date Dupree made a mortgage in the form of a trust deed of one undivided half of the premises to secure the same notes. These deeds were recorded the next year and later Dupree conveyed the land to his wife, whose title is not assailed ex-

cept as subject to the lien for the notes. Then Dupree conveyed other property in trust for creditors in three classes, in the first of which was included one Slayden in respect of the above-mentioned notes, of four of which he had become the holder. Forthwith certain creditors brought a bill to get the benefit of other securities held by one of the preferred creditors and for a receiver. Neither the petitioner nor Slayden were made parties, nor was this property mentioned in the bill. On the same day another similar bill was brought by W. B. Belknap & Company, unsecured creditors, in which Slayden was one of the defendants. The petitioner also was joined in respect of a vendor's lien on other land, which she was alleged fraudulently to assert. It was ordered that on the trial the two suits should be consolidated, the same person having been appointed receiver in each. Then Slayden answered and intervened for three of the notes, one having been paid. By the final decree made on June 30, 1897, it was decided that the plaintiffs in the Belknap bill, to which the petitioner was a party, take nothing by their bill; but, among many other things, the claim of Slayden on his intervention was allowed, it was adjudged that he recover the amount of Dupree and be paid out of the funds in the hands of the court, and it was ordered that thereupon he should endorse the notes, described as secured by vendor's lien on the land in question, to the receiver, without recourse, and that the receiver should sell them and pay the net proceeds into court to be applied with the other funds. The decree was carried out and the notes were sold to one Duke for $300. He afterwards sold them to Mansur, the respondent, who attempted by proceedings unnecessary to state to have the land sold. Then this bill was filed. The Circuit Court granted an injunction. This decree was reversed, and a decree of foreclosure in favor of the respondent ordered by the Circuit Court of Appeals.

The Circuit Court of Appeals proceeded upon the ground that the decree was conclusive upon the petitioner, though for what purposes or with what results is not entirely clear

and is not necessary to inquire. We shall assume that the purchaser took the notes as unpaid, with the vendor's lien attached to the same extent as if Slayden had sold them without coming into court. That certainly is the most that can be attributed to the decree. But since the date of that decree, and before the date of the bill, the notes have been barred by the Texas statute of limitations. It is established law in Texas that when a debt is barred an action to foreclose a lien or mortgage given as security for it is barred also. *Hale* v. *Baker*, 60 Texas, 217; *Goldfrank* v. *Young*, 64 Texas, 432, 434; *Stephens* v. *Mathews*, 69 Texas, 341, 344; *Davis* v. *Andrews*, 88 Texas, 524; *Brown* v. *Cates*, 99 Texas, 133. The former decree afforded no possible ground for not applying the Texas law in the present case.

The respondent argues that the vendor's lien is equitable; that the statute of limitations does not govern equitable proceedings, and that a court of equity will not be governed by the analogy of the statute unless it seems equitable to follow it; that the equity jurisdiction of the United States is not to be affected by state laws; that therefore the United States courts are unincumbered by the Texas decisions, and that they ought to say that it is inequitable to deny a remedy on the security when a suit is barred upon the debt. We will not consider in how many points we disagree with this argument, but will confine ourselves to what we deem a sufficient answer.

A vendor seems to have greater rights than are enjoyed by a purchaser of notes for the price of land, to which a vendor's lien is attached. If not inequitable, the vendor may resolve the sale for non-payment, whereas a later holder of the notes only can have the lands sold and the proceeds applied in satisfaction, and this right is lost when the notes are barred. *Stephens* v. *Mathews*, 69 Texas, 341, 344. (These notes, it will be remembered, had been sold by the vendor long before the sale under the decree.) In one case a lien expressly reserved seems to be regarded as equivalent to a mortgage. *Wilcox* v. *National Bank*, 93 Texas, 322, 331. Whether this be true or

not, we hardly see how a court of law could disregard an express reservation of security, or how a lien so reserved can be called a purely equitable right. But equitable or not it is a creation not of the United States, but of the local law of Texas. If that law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States to say otherwise when sitting in equity any more than when sitting at law. It appears to us equally their duty, when the local law decides that the words create a right, to take the measure of that right from the same source. The notes are barred, as well in equity as at law. By the law of Texas the security is incident to the note and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land. It seems to us that it should be governed by the decisions of the State where the land lies. See *Slide & Spur Gold Mines* v. *Seymour*, 153 U. S. 509, 516.

We should add as an independent consideration that it cannot be admitted for a moment that for a debtor to rely upon the statute of limitation is inequitable of itself without some special circumstance wanting here. That would be for courts, and in this case courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the State, had declared right. There are other questions in the case, but we deem the foregoing reasons sufficient to show that the decree must be reversed.

Decree reversed.

June 1, 1909, MR. JUSTICE HOLMES. To prevent misapprehension there should be added to the opinion at the end the following words:

We have considered only the question of the foreclosure on the cross-bill. The case will be remanded to the Circuit Court for further proceedings in accordance with the opinion, without prejudice to the question whether the bill can be maintained.